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Ontario
Labour Relations
Board

Decisions

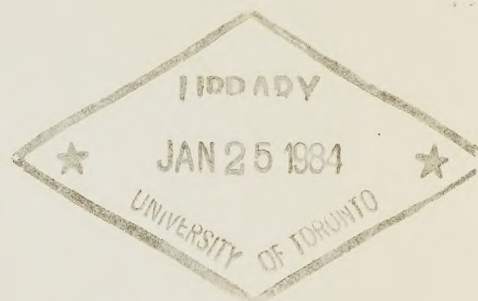
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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1983] OLRB REP. AUGUST

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.





CASES REPORTED

1. AGIP Structural Steel Limited; Re Ironworkers' Union, Local 700	1237
2. Barrie, The Corporation of the City of; Re CUPE, Local 2380	1239
3. Beaton Supersave Inc.; Re Food and Commercial Workers' Union, Local 633; Re Several Individual Applicants	1244
4. Bestview Holdings Limited; Re Service Employees' Union, Local 204; Re CLAC ..	1250
5. Blue Line Taxi Company Limited; Re Canadian Union of Operating Engineers and General Workers	1262
6. Bramalea Limited; Re Labourers' Union, Local 183; Group of Employees	1269
7. Carroll Electric (1982) Limited; Re CLAC; Re Derek Murr	1275
8. Carroll Electric (1982) Limited and J.B. Carroll Electric Limited; Re CLAC	1282
9. Complete Car Care Centre, Central Chev-Olds Inc., and 533556 Ontario Inc., c.o.b. as;; Re UAW and its Local 27	1293
10. Dryden Truck Stop Inc.; Re Retail Clerks' Union, Local 409	1300
11. Falconbridge Limited; Re Michel Cyr; Re Mine Mill Union, Local 598	1303
12. Four Seasons Hotel Toronto (Four Seasons Yorkville); Re Textile Processors, Service Trades, Health Care, Professional and Technical Employees' International Union, Local 351; Group of Employees	1306
13. International Wallcoverings, A Division of International Paints (Canada) Limited; Re Canadian Paperworkers' Union and its Local 305	1316
14. K-Mart Canada Limited; Re Teamsters' Union, Local 419; Re William Stewart on behalf of a Group of Employees	1338
15. Manoni, Frank; Re Labourers' Union, Local 527, Nello Scipioni and Bernadino Carrozzi	1344
16. Mill Dining Lounge; Re Hotels, Clubs, Restaurants and Taverns Employees' Union, Local 261 and several individual respondents	1353
17. Moro, Angelo; Re Operative Plasterers' and Cement Masons, Local 598	1354
18. Movenpick Restaurants of Switzerland, Movel Restaurants Limited, c.o.b. as;; Re Hotel, Restaurant and Cafeteria Employees' Union, Local 75	1355
19. Royal Ontario Museum; Re OPSEU	1361
20. Silknit Limited; Re United Textile Workers of America, Local 354	1362

II

21.	St. Raphael's Nursing Home; Re London and District Service Workers' Union, Local 220	1370
22.	Vogue Brassiere Incorporated; Re International Ladies' Garment Workers' Union; Group of Employees	1375
23.	Thunderhawk Developments, 384368 Ontario Ltd., c.o.b. as;; Re Carpenters' Union, Local 1669	1378
24.	Wheeler Metal Products Ltd.; Re Isaiah Argunen	1386

SUBJECT INDEX

- Adjournment – Discharge for Union Activity – Interference in Trade Union – Hearing scheduled during plant shut-down period – No adjournment in absence of evidence of inconvenience or unavailability of witness – Company refusing to recognize grievor as union steward – Terminating grievor for attitude and causing disruption – Vigorous policing of collective agreement reason for discharge – Discharge unlawful
- SILKNIT LIMITED; RE UNITED TEXTILE WORKERS' OF AMERICA, LOCAL 354 1362
- Bargaining Unit – Practice and Procedure – Voluntary Recognition – Voluntary recognition sweeping in present employees not valid unless majority of them supported union – “Bargaining unit” in s.60(1) means added on portion – Board not striking down agreement reached to expand unit by voluntary recognition before any employees employed in added on portion – Fact disclosing employees hired prior to voluntary recognition – Union failing to establish majority support at time of recognition – No bar to certification application by applicant
- BESTVIEW HOLDINGS LIMITED; RE SERVICE EMPLOYEES' UNION, LOCAL 204; RE CLAC 1250
- Certification – Petition – Employer calling meeting during work time believed by employees to be obligatory – Employer announcing improvements in working conditions as part of ongoing reorganization – Distributing copies of Board form 6 at meeting collectors soliciting signatures for petition during work hours – Total effect of circumstances tainting voluntariness of petition
- BRAMALEA LIMITED; RE LABOURERS' UNION, LOCAL 183; GROUP OF EMPLOYEES 1269
- Certification – Petition – Petition circulated after meeting between employees and management – Management taking notes as each employee discloses position – Appearance of close nexus between origin of petition and management – Petition not voluntary
- FOUR SEASONS HOTEL TORONTO (FOUR SEASONS YORKVILLE); RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; GROUP OF EMPLOYEES 1306
- Charges – Membership Evidence – Union official raising possibility of purchasing employee's car and finding job for employee's boyfriend in course of soliciting union membership – Not made conditional upon employee signing membership card – Board finding no objectionable conditional payment of dollar
- VOGUE BRASSIERE INCORPORATED; RE INTERNATIONAL LADIES' GARMENT WORKERS' UNION; GROUP OF EMPLOYEES 1375
- Collective Agreement – Duty to Bargain in Good Faith – Practice and Procedure – Hospital interest arbitration procedures instituted prior to introduction of *Inflation Restraint Act* – Arbitration board having jurisdiction to continue after passage of Act – Act and regulation making only compensation plan (not whole collective agreement) of no effect – No duty to bargain since collective agreement in effect – Board declaring agreement

in effect – Leaving it to parties to make compensation plan comply with *Inflation Restraint Act*

ST. RAPHAEL'S NURSING HOME; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220 1370

Construction Industry Grievances – Damages – Practice and Procedure – Sale of a Business – Whether insufficient particulars or inadequate notice to affected employees depriving Board of jurisdiction – Whether Board having jurisdiction over grievances relating non-construction part of work – Whether employees failed to mitigate damages by not applying for employment with successor employer – Successor's liability not restricted to period after issuance of Board's sale declaration

CARROLL ELECTRIC (1982) LIMITED; RE CLAC; RE DEREK MURR 1275

Construction Industry Grievance – Employer – Allegation that persons hired contrary to collective agreement – Whether respondent true employer of persons in question – Board applying test to determine employer status

THUNDERHAWK DEVELOPMENTS, 384368 ONTARIO LTD., C.O.B. AS,; RE CARPENTERS' UNION, LOCAL 1669 1378

Construction Industry Grievance – Grievance alleging use of non-union labour – Employer not keeping or producing records of hours spent on project – Union adducing credible evidence on probable length of job through testimony of experienced tradesmen – Board accepting union's evidence in circumstances

AGIP STRUCTURAL STEEL LIMITED; RE IRONWORKERS' UNION, LOCAL 700 1237

Construction Industry Grievances – Damages – Practice and Procedure – Sale of a Business – Whether insufficient particulars or inadequate notice to affected employees depriving Board of jurisdiction – Whether Board having jurisdiction over grievances relating non-construction part of work – Whether employees failed to mitigate damages by not applying for employment with successor employer – Successor's liability not restricted to period after issuance of Board's sale declaration

CARROLL ELECTRIC (1982) LIMITED; RE CLAC; RE DEREK MURR 1275

Damages – Unfair Labour Practice – Whether original decision disposed of extent of compensation – Whether lost gratuities part of damages for lost "wages" – Board ruling gratuities compensable to make whole remedy

MOVENPICK RESTAURANTS OF SWITZERLAND, MOVEL RESTAURANTS LIMITED, C.O.B. AS,; RE HOTEL RESTAURANT AND CAFETERIA EMPLOYEES' UNION, LOCAL 75 1355

Discharge for Union Activity – Adjournment – Interference in Trade Union – Hearing scheduled during plant shut-down period – No adjournment in absence of evidence of inconvenience or unavailability of witness – Company refusing to recognize grievor as union steward – Terminating grievor for attitude and causing disruption – Vigorous policing of collective agreement reason for discharge – Discharge unlawful

SILKNIT LIMITED; RE UNITED TEXTILE WORKERS' OF AMERICA, LOCAL 354 1362

Discharge for Union Activity – Duty to Bargain in Good Faith – Interference in Trade Unions – Remedies – Unfair Labour Practice – Discharges following assault on strike replacements and damage to van – Complaint of grievors who participated in assault dismissed – Grievors merely present at scene of incident reinstated – Failure to testify causing Board to deny compensation – Person causing damage to truck reinstated with no compensation – Person mistakenly believed to have been present at scene reinstated with full compensation – Board reviewing relevance of motive in allegations of interference under s.64 – Refusal to discuss discharges not bad faith bargaining INTERNATIONAL WALLCOVERINGS, A DIVISION OF INTERNATIONAL PAINTS (CANADA) LIMITED; RE CANADIAN PAPERWORKERS' UNION AND ITS LOCAL 305	1316
Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Unfair representation complaint seeking inquiry into irregularities in union pension fund – Duty concerning union representation of employees vis-a-vis employer – Not applicable to internal union matters – Dismissed without breaking for absence of prima facie case MORO, ANGELO; RE OPERATIVE PLASTERERS AND CEMENT MASONS, LOCAL 598	1354
Duty of Fair Representation – Unfair Labour Practice – Collective agreement requiring promotions to be on basis of seniority and ability – Union practice to not apply collective agreement requirement to disabled employees – Able-bodied complainant adversely affected by union practice – Grievance considered by union official and rejected by membership – Accommodation of needs of disabled employee reasonable and landable – No breach of duty of fair representation FALCONBRIDGE LIMITED; RE MICHEL CYR; RE MINE MILL UNION, LOCAL 598	1303
Duty to Bargain in Good Faith – Collective Agreement – Practice and Procedure – Hospital interest arbitration procedures instituted prior to introduction of <i>Inflation Restraint Act</i> – Arbitration Board having jurisdiction to continue after passage of Act – Act and regulation making only compensation plant (not whole collective agreement) of no effect – No duty to bargain since collective agreement in effect – Board declaring agreement in effect – Leaving it to parties to make compensation plan comply with <i>Inflation Restraint Act</i> ST. RAPHAEL'S NURSING HOME; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220	1370
Duty to Bargain in Good Faith – Discharge for Union Activity – Interference in Trade Unions – Remedies – Unfair Labour Practice – Discharges following assault on strike replacements and damage to van – Complaint grievors who participated in assault dismissed – Grievors merely present at scene of incident reinstated – Failure to testify causing Board to deny compensation – Person causing damage to truck reinstated with no compensation – Person mistakenly believed to have been present at scene reinstated with full compensation – Board reviewing relevance of motive in allegations of interference under s.64 – Refusal to discuss discharges not bad faith bargaining INTERNATIONAL WALLCOVERINGS, A DIVISION OF INTERNATIONAL PAINTS (CANADA) LIMITED; RE CANADIAN PAPERWORKERS' UNION AND ITS LOCAL 305	1316

Employee – Employee Reference – Practice and Procedure – Board applying criteria to determine employee status of persons occupying newly-created positions – Evidence of extensive practice in new position not essential in every case BARRIE, THE CORPORATION OF THE CITY OF,; RE CUPE, LOCAL 2380 ..	1239
Employee – Employee Reference – Practice and Procedure – New position advertized but not yet filled – “Person” must testify as to duties in employee referral – Application premature since no person able to testify as to duties – Board comparing <i>City of Barrie</i> decision ROYAL ONTARIO MUSEUM; RE OPSEU	1361
Employee Reference – Employee – Practice and Procedure – Board applying criteria to determine employee status of persons occupying newly-created positions – Evidence of extensive practice in new position not essential in every case BARRIE, THE CORPORATION OF THE CITY OF,; RE CUPE, LOCAL 2380 ..	1239
Employee Reference – Employee – Practice and Procedure – New position advertized but not yet filled – “Person” must testify as to duties in employee referral – Application premature since no person able to testify as to duties – Board comparing <i>City of Barrie</i> decision ROYAL ONTARIO MUSEUM ; RE OPSEU	1361
Employer – Construction Industry Grievance – Allegation that persons hired contrary to collective agreement – Whether respondent true employer of persons in question – Board applying test to determine employer status THUNDERHAWK DEVELOPMENTS, 384368 ONTARIO LTD., C.O.B. AS,; RE CARPENTERS’ UNION, LOCAL 1669	1378
Health and Safety – Refusal to operate grinder – Discomfort because of grievor’s allergic conditions – Refusal section not intended to apply where person not physically suited to job – No “danger” established – Dismissal not unlawful WHEELER METAL PRODUCTS LTD.; RE ISAAH ARGUNEN	1386
Interference in Trade Union – Adjournment – Discharge for Union Activity – Hearing scheduled during plant shut-down period – No adjournment in absence of evidence of inconvenience or unavailability of witness – Company refusing to recognize grievor as union steward – Terminating grievor for attitude and causing disruption – Vigorous policing of collective agreement reason for discharge – Discharge unlawful SILKNIT LIMITED; RE UNITED TEXTILE WORKERS OF AMERICA, LOCAL 354	1362
Interference in Trade Unions – Discharge for Union Activity – Duty to Bargain in Good Faith – Remedies – Unfair Labour Practice – Discharges following assault on strike replacements and damage to van – Complaint of grievors who participated in assault dismissed – Grievors merely present at scene of incident reinstated – Failure to testify causing Board to deny compensation – Person causing damage to truck reinstated with no compensation – Person mistakenly believed to have been present at scene reinstated with full compensation – Board reviewing relevance of motive in allegations of interference under s.64 – Refusal to discuss discharges not bad faith bargaining	

INTERNATIONAL WALLCOVERINGS, A DIVISION OF INTERNATIONAL PAINTS (CANADA) LIMITED; RE CANADIAN PAPERWORKERS' UNION AND ITS LOCAL 305	1316
Membership Evidence – Charges – Union official raising possibility of purchasing employee's car and finding job for employee's boyfriend in course of soliciting union membership – Not made conditional upon employee signing membership card – Board finding no objectionable conditional payment of dollar	
VOGUE BRASSIERE INCORPORATED; RE INTERNATIONAL LADIES' GARMENT WORKERS' UNION; GROUP OF EMPLOYEES	1375
Petition – Certification – Employer calling meeting during work time believed by employees to be obligatory – Employer announcing improvements in working conditions as part of ongoing reorganization – Distribution copies of Board form 6 at meeting collectors soliciting signatures for petition during work hours – Total effect of circumstances tainting voluntariness of petition	
BRAMALEA LIMITED; RE LABOURERS' UNION, LOCAL 183; GROUP OF EMPLOYEES	1269
Petition – Certification – Petition circulated after meeting between employees and management – Management taking notes as each employee discloses position – Appearance of close nexus between origin of petition and management – Petition not voluntary	
FOUR SEASONS HOTEL TORONTO (FOUR SEASONS YORKVILLE); RE TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION, LOCAL 351; GROUP OF EMPLOYEES	1306
Petition – Termination – Collectors moving around workplace freely during work hours soliciting signatures – Signatures collected at gate in view of guard – These factors contained with history of unlawful anti-union conduct by employer causing Board to find petition not voluntary	
K-MART CANADA LIMITED; RE TEAMSTERS' UNION, LOCAL 419; RE WILLIAM STEWART ON BEHALF OF A GROUP OF EMPLOYEES	1338
Practice and Procedure – Bargaining Unit – Voluntary Recognition – Voluntary recognition sweeping in present employees not valid unless majority of them supported union – “Bargaining unit” in s.60(1) means added on portion – Board not striking down agreement reached to expand unit by voluntary recognition before any employees employed in added on portion – Fact disclosing employees hired prior to voluntary recognition – Union failing to establish majority support at time of recognition – No bar to certification application by applicant	
BESTVIEW HOLDINGS LIMITED; RE SERVICE EMPLOYEES' UNION, LOCAL 204; RE CLAC	1250
Practice and Procedure – Collective Agreement – Duty to Bargain in Good Faith – Hospital interest arbitration procedures instituted prior to introduction of <i>Inflation Restraint Act</i> – Arbitration board having jurisdiction to continue after passage of Act – Act and regulation making only compensation plan (not whole collective agreement) of no effect – No duty to bargain since collective agreement in effect – Board declaring agreement in effect – Leaving it to parties to make compensation plan comply with <i>Inflation Restraint Act</i>	

ST. RAPHAEL'S NURSING HOME; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220	1370
Practice and Procedure – Construction Industry Grievances – Damages – Sale of a Business – Whether insufficient particulars or inadequate notice to affected employees depriving Board of jurisdiction – Whether Board having jurisdiction over grievances relating non-construction part of work – Whether employees failed to mitigate damages by not applying for employment with successor employer – Successor's liability not restricted to period after issuance of Board's sale declaration	
CARROLL ELECTRIC (1982) LIMITED; RE CLAC; RE DEREK MURR	1275
Practice and Procedure – Duty of Fair Representation – Unfair Labour Practice – Unfair representation complaint seeking inquiry into irregularities in union pension fund – Duty concerning union representation of employees vis-a-vis employer – Not applicable to internal union matters – Dismissed without hearing for absence of prima facie case	
MORO, ANGELO; RE OPERATIVE PLASTERERS' AND CEMENT MASONS, LOCAL 598	1354
Practice and Procedure – Employee – Employee Reference – Board applying criteria to determine employee status of persons occupying newly-created positions – Evidence of extensive practice in new position not essential in every case	
BARRIE, THE CORPORATION OF THE CITY OF,; RE CUPE, LOCAL 2380 ..	1239
Practice and Procedure – Employee – Employee Reference – New position advertized but not yet filled – “Person” must testify as to duties in employee referral – Application premature since no person able to testify as to duties – Board comparing <i>City of Barrie</i> decision	
ROYAL ONTARIO MUSEUM; RE OPSEU	1361
Practice and Procedure – Related Employer – Alternate applications for declaration of sale and related employer made – Board receiving evidence but no ruling on related employer application – On subsequent application Board relying on evidence received at prior hearing – Two companies arranging assets so as to avoid recovery by union for breach of collective agreement – No delay – Anti-union animus influencing Board discretion to make declaration – Attempt for “deep-pocket” relief in <i>Total Marketing</i> case distinguished	
CARROLL ELECTRIC (1982) LIMITED AND J.B. CARROLL ELECTRIC LIMITED; RE CLAC	1282
Practice and Procedure – Trade Union – Unfair Labour Practice – Defeated candidate seeking to set aside election on basis of intimidation and coercion – Board stressing its limited jurisdiction over internal union affairs – Evidence of actual threat of physical or economic has required to establish intimidation and coercion – Complaint dismissed	
MANONI, FRANK; RE LABOURERS' UNION, LOCAL 527, NELLO SCIPIONI AND BERNADINO CARROZZI	1344
Related Employer – Practice and Procedure – Alternate applications for declaration of sale and related employer made – Board receiving evidence but not ruling on related employer application – On subsequent application Board relying on evidence received at	

prior hearing – Two companies arranging assets so as to avoid recovery by union for breach of collective agreement – No delay – Anti-union animus influencing Board discretion to make declaration – Attempt for “deep-pocket” relief in <i>Total Marketing</i> case distinguished	
CARROLL ELECTRIC (1982) LIMITED AND J.B. CARROLL ELECTRIC LIMITED; RE CLAC	1282
Related Employer – Sale of a Business – Whether sub-contracting of washing and rust-proofing work constituting sale of part of business – Transfer of work alone not constituting sale – No common ownership or management – Not related employers	
COMPLETE CAR CARE CENTRE, CENTRAL CHEV-OLDS INC., AND 533556 ONTARIO INC., C.O.B. AS.; RE UAW AND ITS LOCAL 27	1293
Remedies – Discharge for Union Activity – Duty to Bargain in Good Faith – Interference in Trade Unions – Unfair Labour Practice – Discharges following assault on strike replacements and damage to van – Complaint of grievors who participated in assault dismissed – Grievors merely present at scene of incident reinstated – Failure to testify causing Board to deny compensation – Person causing damage to truck reinstated with no compensation – Person mistakenly believed to have been present at scene reinstated with full compensation – Board reviewing relevance of motive in allegations of interference under s.64 – Refusal to discuss discharges not bad faith bargaining	
INTERNATIONAL WALLCOVERINGS, A DIVISION OF INTERNATIONAL PAINTS (CANADA) LIMITED; RE CANADIAN PAPERWORKERS’ UNION AND ITS LOCAL 305	1316
Sale of a Business – Construction Industry Grievances – Damages – Practice and Procedure – Whether insufficient particulars or inadequate notice to affected employees depriving Board of jurisdiction – Whether Board having jurisdiction over grievances relating non-construction part of work – Whether employees failed to mitigate damages by not applying for employment with successor employer – Successor’s liability not restricted to period after issuance of Board’s sale declaration	
CARROLL ELECTRIC (1982) LIMITED; RE CLAC; RE DEREK MURR	1275
Sale of a Business – Related Employer – Whether sub-contracting of washing and rust-proofing work constituting sale of part of business – Transfer of work alone not constituting sale – No common ownership or management – Not related employers	
COMPLETE CAR CARE CENTRE, CENTRAL CHEV-OLDS INC., AND 533556 ONTARIO INC., C.O.B. AS.; RE UAW AND ITS LOCAL 27	1293
Sale of a Business – Termination – Union writing to purchaser specifying effect of successor provisions of Act – Not constituting notice to bargain within meaning of s.63(3) – Not rendering termination applications untimely	
BEATON SUPERSAVE INC.; RE FOOD AND COMMERCIAL WORKERS’ UNION, LOCAL 633; RE SEVERAL INDIVIDUAL APPLICANTS	1244
Strike – Employees not scheduled to work participating in picketing – No employee failing to perform shift scheduled – Not “strike” within meaning of Act	
MILL DINING LOUNGE; RE HOTELS, CLUBS, RESTAURANTS AND TAVERNS EMPLOYEES’ UNION, LOCAL 261 AND SEVERAL INDIVIDUAL RESPONDENTS	1353

Termination – Petition – Collectors moving around workplace freely during work hours soliciting signatures – Signatures collected at gate in view of guard – These factors contained with history of unlawful anti-union conduct by employer causing Board to find petition not voluntary K-MART CANADA LIMITED; RE TEAMSTERS’ UNION, LOCAL 419; RE WILLIAM STEWART ON BEHALF OF A GROUP OF EMPLOYEES	1338
Termination – Sale of a Business – Union writing to purchaser specifying effect of successor provisions of Act – Not constituting notice to bargain within meaning of s.63(3) – Not rendering termination applications untimely BEATON SUPERSAVE INC.; RE FOOD AND COMMERCIAL WORKERS’ UNION, LOCAL 633; RE SEVERAL INDIVIDUAL APPLICANTS	1244
Trade Union – Practice and Procedure – Unfair Labour Practice – Defeated candidate seeking to set aside election on basis of intimidation and coercion – Board stressing its limited jurisdiction over internal union affairs – Evidence of actual threat of physical or economic has required to establish intimidation and coercion – Complaint dismissed MANONI, FRANK; RE LABOURERS’ UNION, LOCAL 527, NELLO SCIPIONI AND BERNADINO CARROZZI	1344
Trade Union – Unfair Labour Practice – Employer deducting dues for all taxi drivers other than “replacement drivers” – Dispute whether replacement drivers within bargaining unit described in collective agreement – Whether reference to shift-drivers and spare drivers including replacement drivers – Language and practical considerations causing Board to find parties did not intend to include replacement drivers BLUE LINE TAXI COMPANY LIMITED; RE CANADIAN UNION OF OPERATING ENGINEERS AND GENERAL WORKERS	1262
Trade Union – Unfair Labour Practice – Union not requesting full dues deduction clause made available by s.43 during negotiations for first agreement – Employers bound to deduct only from employees who authorize as per agreement provision – Board finding union entitled to make request under s.43 for full dues deduction during terms of first agreement DRYDEN TRUCK STOP INC.; RE RETAIL CLERKS’ UNION, LOCAL 409	1300
Voluntary Recognition – Bargaining Unit – Practice and Procedure – Voluntary recognition sweeping in present employees not valid unless majority of them supported union – “Bargaining unit” in s.60(1) means added on portion – Board not striking down agreement reached to expand unit by voluntary recognition before any employees employed in added on portion – Fact disclosing employees hired prior to voluntary recognition – Union failing to establish majority support at time of recognition – No bar to certification application by applicant BESTVIEW HOLDINGS LIMITED; RE SERVICE EMPLOYEES’ UNION, LOCAL 204; RE CLAC	1250
Unfair Labour Practice – Damages – Whether original decision disposed of extent of compensation – Whether lost gratuities part of damages for lost “wages” – Board ruling gratuities compensable to make whole remedy	

MOVENPICK RESTAURANTS OF SWITZERLAND, MOVEI RESTAURANTS LIMITED, C.O.B. AS,; RE HOTEL AND RESTAURANT AND CAFETERIA EMPLOYEES' UNION, LOCAL 75	1355
Unfair Labour Practice – Discharge for Union Activity – Duty to Bargain in Good Faith – Interference in Trade Unions – Remedies – Discharges following assault on strike replacements and damage to van – Complaint of grievors who participated in assault dismissed – Grievors merely present at scene of incident reinstated – Failure to testify causing Board to deny compensation – Person causing damage to truck reinstated with no compensation – Person mistakenly believed to have been present at scene reinstated with full compensation – Board reviewing relevance of motive in allegations of interference under s.64 – Refusal to discuss discharges not bad faith bargaining	
INTERNATIONAL WALLCOVERINGS, A DIVISION OF INTERNATIONAL PAINTS (CANADA) LIMITED; RE CANADIAN PAPERWORKERS' UNION AND ITS LOCAL 305	1316
Unfair Labour Practice – Duty of Fair Representation – Collective agreement requiring promotions to be on basis of seniority and ability – Union practice to not apply collective agreement requirements to disabled employees – Able-bodied complainant adversely affected by union practice – Grievance considered by union official and rejected by membership – Accommodation of needs of disabled employee reasonable and landable – No breach of duty of fair representation	
FALCONBRIDGE LIMITED; RE MICHEL CYR; RE MINE MILL UNION, LOCAL 598	1303
Unfair Labour Practice – Duty of Fair Representation – Practice and Procedure – Unfair representation complaint seeking inquiry into irregularities in union pension fund – Duty concerning union representation of employees vis-a-vis employer – Not applicable to internal union matters – Dismissed without breaking for absence of prima facie case	
MORO, ANGELO; RE OPERATIVE PLASTERES' AND CEMENT MASONS, LOCAL 598	1354
Unfair Labour Practice – Practice and Procedure – Trade Union – Defeated candidate seeking to set aside election on basis of intimidation and coercion – Board stressing its limited jurisdiction over internal union affairs – Evidence of actual threat of physical or economic has required to establish intimidation and coercion – Complaint dismissed	
MANONI, FRANK; RE LABOURERS' UNION, LOCAL 527, NELLO SCIPIONI AND BERNADINO CARROZZI	1344
Unfair Labour Practice – Trade Union – Employer deducting dues for all taxi drivers other than “replacement drivers” – Dispute whether replacement drivers within bargaining unit described in collective agreement – Whether reference to shift-drivers and spare drivers including replacement drivers – Language and practical considerations causing Board to find parties did not intend to include replacement drivers	
BLUE LINE TAXI COMPANY LIMITED; RE CANADIAN UNION OF OPERATING ENGINEERS AND GENERAL WORKERS	1262
Unfair Labour Practice – Trade Union – Union not requesting full dues deduction clause made available by s.43 during negotiations for first agreement – Employer bound to deduct only from employees who authorize as per agreement provision – Board find-	

ing union entitled to make request under s.43 for full dues deduction during term of first agreement

DRYDEN TRUCK STOP INC.; RE RETAIL CLERKS' UNION, LOCAL 409 1300

2551-82-M International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Applicant, v. AGIP Structural Steel Limited, Respondent

Construction Industry Grievance – Grievance alleging use of non-union labour – Employer not keeping or producing records of hours spent on project – Union adducing credible evidence on probable length of job through testimony of experienced tradesmen – Board accepting union’s evidence in circumstances

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

APPEARANCES: *L. Steinberg and F. Marr for the applicant; Vincenzo Ciotoli for the respondent.*

DECISION OF THE BOARD; August 15, 1983

1. This is the referral of a grievance to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*.

2. The grievance arises out of a job of the respondent performed for St. Clair College in February of 1983. The respondent appeared without counsel, and was represented by one of its two owners, Vincenzo Ciotoli. Mr. Ciotoli acknowledged that the respondent was bound to the applicant’s collective agreement, and that the job in question involved work falling within the scope of that agreement. He took the position, however, that the job was only a small one, and that the union accordingly did not really lose anything. While the Board does not normally entertain evidence of settlement discussions, in this case an actual settlement of the grievance had been reached, reduced to writing, and signed by Mr. Ciotoli. Mr. Ciotoli admits the fact of the settlement, but testified that after signing it, his wife, the other part-owner in the company, returned from vacation and told him he was paying too much. The respondent accordingly has refused to recognize the settlement. The evidence disclosed that Mr. Ciotoli himself has always exercised full signing authority in dealing with the trade union on behalf of the respondent company, without any mention being made of his partner, and the Board would likely have exercised its jurisdiction to direct compliance with the settlement had the union so requested (see *Suss Woodcraft Ltd.* (unreported), Board File No. 2627-82-M dated April 21, 1983). The union, however, takes the position that it would accept the settlement as an alternative position, but, having now been forced to the expense of attending a further hearing before the Board, seeks as its first claim the full amount of damages due under the grievance. The issue before the Board, therefore, was the question of determining the amount of those damages.

3. Mr. Ciotoli’s evidence is that the bulk of the work on this job was performed by himself. (Mr. Ciotoli is a member of the union, and the applicant does not claim damages for the time worked by Mr. Ciotoli.) Beyond that, Mr. Ciotoli testified that he used his two sons, who were unemployed, to assist him in the erection and installation of this 60’ skirting wall. Mr. Ciotoli testified that he was not personally at the job all of the time, and that his two sons together spent three days on the job. He said that their time would have been less if he had been there to supervise them all the time. In addition, the job called for applying a finished coat of paint as well as the priming, and all of the painting was sub-contracted by

the respondent to an outside firm. Mr. Ciotoli testified that there were two painters on the job, and he estimated that it took them approximately half a day to do the spot-painting and priming, and another full day to apply the finished coat. The evidence of the union is that their ironworkers might be asked to apply the finished coat on a job of this size.

4. The union claims that all of the work performed falls within its work jurisdiction under the collective agreement as the "field fabrication, installation, and erection ... of structural and miscellaneous steel". The applicant called two experienced witnesses, one of them a trade instructor at St. Clair College, who, in fact, discovered the job in progress, and their estimate of the job was that it would take a crew of four men a minimum of five days to complete. Apart from that, the applicant has no evidence as to when the job commenced or was completed. Mr. Ciotoli was summonsed by the applicant in the normal course to bring to the hearing all of his payroll records and other documentation which would substantiate the extent of the job, but Mr. Ciotoli produced no documentary evidence whatever in support of his own testimony. Mr. Ciotoli explained that neither he nor his sons appear on the payroll records of his company, and that he did not bring the material pertaining to the painting contract because he did not believe that that was Ironworkers' work. The Board is left, therefore, with having to weigh the applicant's estimate as to how long the job could be expected to take against Mr. Ciotoli's unsubstantiated claim as to how much time in fact was spent.

5. The task of the Board is a difficult one. Damages are in no way meant to be punitive, and estimates of how long a job "ought" to take can vary widely depending upon the side of the fence on which the speculator was standing. On the other hand, the applicant's witnesses were experienced tradesmen, had a good opportunity to examine the job in progress, and were credible in their evidence. The normal method of verifying the number of man hours involved in the job was pursued by the union, but bore no fruit only because of the employer's failure to keep proper records. It is the view of the Board that where the union is in a position to produce, as here, credible evidence as to the approximate size of the job, and the employer has elected, for its own reasons, not to keep the proper records which could rebut that evidence, the union's estimate can be accepted. The Board is not persuaded, however, on the equivocal evidence which it heard, that the contracting out of the finished-painting work on this job was necessarily a violation of the collective agreement. The Board attributes that painting work to roughly one day of the five in the applicant's estimate of the job, and accordingly finds that the applicant has proved its damages to the extent of four days' work for four men, or 16 man days. It is agreed that a normal day under this collective agreement is eight hours, and the applicable rate is \$19.79 (excluding the three-cent contribution to the Employer's Fund).

6. The Board accordingly finds that the respondent has violated the terms of its collective agreement with the applicant, and orders it to pay forthwith to the applicant, for the appropriate distribution amongst its members and Benefit Funds, the amount of \$2,533.12.

2161-81-M The Corporation of the City of Barrie, Applicant, v. The Canadian Union of Public Employees, Local 2380, Respondent.

Employee – Employee Reference – Practice and Procedure – Board applying criteria to determine employee status of persons occupying newly-created positions – Evidence of extensive practice in new position not essential in every case

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

DECISION OF THE BOARD; August 15, 1983

1. This is an application under section 106(2) of the *Labour Relations Act*, requesting the Board to determine whether the persons occupying the classification of Operations Manager, Supply and Services Supervisor, Planning and Development Property Standards and Management Officer, and Operations Technologist are “employees” for the purposes of the Act. The applicant employer takes the position that all four are excluded under section 1(3)(b) of the Act. According to the evidence, however, the collective agreement covering outside employees of the City provides that all new positions are considered to fall within the scope of the collective agreement, until agreed or determined otherwise.

The employer has therefore filed the present application.

2. The Operations Manager is a new classification introduced in November of 1982. At present the incumbent is Merlin Dewing. The position of the City is that this classification was introduced to create a level of management between the Public Works Superintendent, Mr. Fox, and the Equipment and Operations Supervisors, and the evidence bears out that this is exactly what has taken place. The two named Supervisors are presently excluded from the collective agreement as managerial, as are the foremen in the department under them. The evidence leaves no doubt that the new Operations Manager has been given the full responsibility for all aspects of the administration of the department, and it is to Mr. Dewing that the two Supervisors and, indirectly, the foremen, now report, as well as the 40-50 bargaining unit employees under the foremen. On the evidence, Mr. Dewing is clearly not an “employee” within the meaning of the Act. The fact that the respondent, at least in the face of the evidence, continues to dispute this position does little to promote its overall credibility before the Board. The respondent’s position, however, is presumably based on the fact that the job is a new one, and more will be said about this later in the decision.

3. It appears that the “Supply and Services Supervisor” was created to split the department previously reporting to the Administrative Supervisor, and to relieve the latter of direct supervision of the Supply and Services portion. Mr. Robert Bourne has occupied the position of Supply and Services Supervisor for approximately one year, and appears on all of the evidence to be on the same organizational level as the Chief Clerk (who is excluded and also reports to the Administrative Supervisor). Mr. Bourne has three full-time employees reporting to him, two storesmen and a custodian. Mr. Bourne does not perform any of the same work performed by these individuals, and when he is absent, no one but the Equipment Supervisor (who is excluded) takes over his desk. When the custodian was off work for a period due to illness, Mr. Bourne acted on his own to hire a short-term replacement. Mr. Bourne

also hired on his own the 9 “casual” employees employed by the City under the Ontario Employment Incentive Programme. Mr. Bourne performs regular written evaluations on the individuals reporting to him, and, for those not at the top of their range under the collective agreement, recommends whether or not a merit increase is in order. In the only opportunity for this to date, his recommendation has been followed. Mr. Bourne does the scheduling and assigns the work for his department, and grants time off on a casual basis if he feels that the request is justified. He indicates that he would confer with someone at a higher level only if the request for time off was on an extended basis. Mr. Bourne authorizes the employees’ time cards and attendance record, as well as overtime, for the purpose of payment. He has had occasion in his first year on the job to reprimand employees orally and in writing, although no permanent employee has yet been hired or fired in a department. He did, however, act on his own to prematurely terminate the employment of an unsatisfactory employee under the Ontario Employment Incentive Programme. His desk is kept locked, and in it he keeps “notes that I have made on my own behalf relative to employees, direction I have given employees, information that is pertinent to the City’s operation, budget figures”. He attends meetings with the other supervisors at his level, together with the Administrative Supervisor, and at these meetings questions such as hours of work, and the application of the collective agreement, are discussed. He has not yet had a formal grievance filed within his department, but when an employee had a claim that he had improperly been denied the “boot allowance” under the collective agreement, it was to Mr. Bourne that the employee and his steward made their complaint. Mr. Bourne denied the claim, and the matter ended there. Mr. Bourne does not normally perform any of the functions of the three employees under him, and indicates the only time that he would do so would be if, for example, both of the storemen were absent, and then only on a short-term basis to keep the operation flowing. The Board is satisfied on the evidence that Mr. Bourne acts as and is perceived by his employees as a member of management, and is not an “employee” for the purpose of the Act.

4. Lloyd Pearson is the Senior Property Standards Officer and Property Manager for the City of Barrie. The title really refers to two distinct jobs. Mr. Pearson has for a number of years been the Senior Property Standards Officer, and as such was responsible for supervising the work of two junior property standards officers. In that capacity he has historically been included within the coverage of the collective agreement. More recently, however, he has taken over responsibility for the function of Property Acquisition and Purchases from another member of management, Mr. Peck. In his new capacity, Mr. Pearson is responsible for managing some 40 to 50 pieces of property belonging to the City. His main responsibility in that regard appears to be for the office building in which the City’s offices have always been located, together with the newly-acquired Municipal Tower Building at another location. Mr. Pearson maintains an office in both of these primary buildings. He has reporting to him on a full-time basis the building superintendent for the Police Station, together with the building superintendent for the new Tower Building, whom he has just hired. He also has two regular part-time employees reporting to him in the maintenance area. He hired the Tower Building superintendent entirely on his own, as he does for any casual maintenance employees required from time to time. He also on his own sets the rate to be paid these casual employees, based on his sense of what the appropriate rate is in the community. As he puts it: “I know what’s involved so I can put a dollar value on it and, of course, I’m trying to get the work done at as reasonable a rate as possible because I’m working for the City. I don’t want to throw the money away.” In his role as Property Manager, he reports directly to the City Administrator, Mr. Straughan, with whom he meets on a regular basis. The topics of discussion are described only in a general way in the transcript, being “primarily the things that I wanted

to do or authority I wanted to do in connection with the land acquisitions, expenditures of money on properties that we have or want to repair or demolish or that type of thing.” With respect to the Property Standards job, he reports to Rick Bates, the head of the division. He attends meetings every two weeks with Mr. Bates and the other department heads in that division “to co-ordinate the work loads and discuss personnel problems and establish department goals and things of that nature”. It appears that in respect of the employees reporting to him, Mr. Pearson is responsible for verifying work time, authorizing overtime, granting casual time off, and performing regular written evaluations on an annual basis. Looking at the combined effect of these responsibilities in conjunction with Mr. Pearson’s additional responsibilities as Property Manager, the Board is satisfied that Mr. Pearson is no longer an “employee” for the purposes of the Act.

5. The final person in dispute is Mr. George Kaveckas, the Operations Technologist. This once again is a newly-developed position, and Mr. Kaveckas in fact was not hired to commence his duties until February 21, 1983. The revised application date for these proceedings is January 27, 1983. Since, the date of the application is the normal cutoff date, under the Board’s practice and procedure, for the admission of evidence relevant to the duties and responsibilities of a position, an examination of Mr. Kaveckas would initially have been premature at this time. The respondent, however, agreed to the addition of Mr. Kaveckas to the list of persons in dispute for the purposes of these proceedings, and indeed participated in the examination of Mr. Kaveckas as to the duties and responsibilities which he has been performing since the date that he was hired in February. In the circumstances, the Board must take it that the respondent has deliberately waived the application date of January 27, 1983, as a “cutoff” date with respect to Mr. Kaveckas, in order that the status of this person in dispute between the parties can be resolved by the Board at the same time as the others.

6. Mr. Kaveckas apparently was examined before the Board Officer on March 16, 1983, so that his evidence spans some three and a half weeks in actual performance of the job. As the Board has said in the past, its task is to attempt to assess the *actual* (as opposed to theoretical) duties and responsibilities assigned to a particular individual, together with the extent, if any, of that person’s authority. If the only evidence before the Board is that that individual has at some point been advised that he has certain authority, or has been presented with a job description outlining such authority, that evidence may, in a given case, be insufficient to establish the actual existence of such authority or responsibility. This might be so, for example, where there is contradictory evidence suggesting the contrary, such as the person’s relative position in the hierarchy of the organization, or what the actual practice in the work place has been. A party seeking to justify an exclusion where none has existed before must be conscious of the evidentiary onus upon it, as discussed at length in *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1153. The newer the position, and the lower the level, the more difficult it may be for a party to meet that evidentiary onus. Particularly where the demarcation line between management and the bargaining unit has never been clearly drawn, and the authority of a first-line supervisor rests upon the individual’s ability to make “effective recommendations”, a period of time may have to elapse before anyone is in a position to determine whether the individual’s recommendations are generally “effective”. On the other hand, a newly-appointed “manager” need not be shown to have fired a fellow member of the bargaining unit before the Board can be satisfied that the person is in fact a manager. That is not a position which the members of the bargaining unit would likely wish their trade union to adopt before the Board, and indeed it is not a position which the trade union has specifically urged upon us in the present case. In addition, the overall or-

ganizational structure of the employer may leave no doubt, having regard to the existing line of managerial authority, that a newly-created position falls above that line. Unequivocal evidence of reporting lines may, in such cases, provide a convincing substitute for specific acts of hiring, firing, etc., which often times will take place at a more subordinate level of management.

7. There have, however, been few reported cases dealing with this problem of newly-created positions. In *Sudbury Algoma Hospital*, (unreported), Board File No. 0078-81-M, released September 22, 1981, the Board commented on the problem as follows, at paragraphs 3 and 4:

3. The present case is not without difficulty for the Board, having regard in particular to the fact that the Board is called upon to assess a newly-created position. As the Board stated in *Sudbury & District Health Unit*, (unreported), Board File No. 2055-79-M, released March 11, 1981:

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient that an individual has "paper powers" contained in a job description, or a "managerial" job title, if managerial functions are not actually exercised. Of course, if the challenged individual has been recently promoted, or the disputed position recently created, the full range of managerial powers may not have been exercised by the time the matter comes before the Board. In the former case, some assistance can usually be gleaned from the duties and responsibilities of the previous incumbent; while in the latter case, the application may simply be premature.

Particularly where the managerial authority consists of the ability to make "effective recommendations", a lack of actual experience in that regard makes it difficult for the Board to assess the degree of "effectiveness" of those recommendations.

4. In the present case, however, the duties and responsibilities set out in the Quality Assurance Co-ordinator's job description are not unsupported by the evidence to date. Mrs. Wells has in fact assumed control of the hospital's quality assurance programme, and is actively functioning as the chairman of the various performance-related committees. As noted, the Quality Assurance Programme Committee in particular is composed solely of existing members of management, and it would be somewhat anomalous if the person charged with the responsibility of chairing and co-ordinating the activities of that committee were the only person on that committee considered not to be a member of management. On the contrary, all of the evidence indicates that this position was created as a truly managerial position, in fact above the level of both head nurses and supervisors, and that the position could not be expected to effectively function otherwise. The responsibility of Mrs. Wells to both initiate and effectively monitor the quality assurance programme for the hospital dis-

tinguishes her from the simple “resource” or “technical” person who may be called upon to carry out particular studies for management, and for whom a *demonstrated* power of effective recommendation is generally more critical in making a finding of managerial status.

8. Here the four persons in dispute in this application all involve newly-created positions, and each to a greater or lesser degree has raised the problem for the Board of having to make a judgement, on the limited evidence available, as to whether or not the position has indeed been established on the “managerial” side of the line. The job of the Operations Manager, in light of the existing structure and his evidence, posed no problem at all. At the other end of the spectrum, with evidence of only three and a half weeks in the job, and a more subordinate position at that, the case of the Operations Technologist is more difficult. The City’s organization chart and Mr. Kaveckas’ job description show him reporting directly to the Operations Engineer, and being responsible for the joint areas of Transit and of Traffic and Parking Control. The evidence of Mr. Kaveckas confirms that responsibility. On the transit side, he supervises the only clerk in that area. On the other side, he supervises the already excluded Supervisor of Traffic and Parking, together with 10 other employees who report either directly to him or to the Supervisor of Traffic and Parking. Mr. Kaveckas attends meetings with other members of management (principally the Operations Engineer) regularly, and has already attended one grievance meeting on a matter arising out of his department. That meeting was with the Operations Engineer and the Director of Personnel, and the City’s approach to the grievance and interpretation of the collective agreement were the subjects of the discussion. Mr. Kaveckas has had no occasion to discipline anyone under him in the three and a half weeks that he has worked for the City, but he *has* been approached for a day off for personal business by his Traffic and Parking Supervisor (again, an excluded position), and granted permission on his own. Mr. Kaveckas considers himself to be a member of management, based on the expectations explained to him of the job, and the manner in which he has been made privy to management dialogue. On cross-examination he was asked by the respondent:

Q. And was the job description or the duties and responsibilities along the lines of technical knowledge, or were you also advised that you would have certain responsibilities pertaining to the employees in your department?

A. I would say both. There is a certain degree of technical knowledge you need for the job and, also, some supervisory skills also.

Q. That was discussed and indicated to you that those would be the expectations of the job, eh?

A. Yes.

The combined effect of Mr. Kaveckas’ evidence is that the two elements of the job are split roughly 50/50.

9. On the evidence it is clear that Mr. Kaveckas believes that he possesses, and, in

the limited time available, has in fact been performing, the managerial responsibilities set out in his job description, and the Board is satisfied that this individual is not an "employee" within the meaning of the Act.

0696-83-R; 0703-83-R; 0697-83-U; 0702-83-R; 0705-83-R; 0706-83-R; 0707-83-R
 Kevin Bartlett, Applicant, v. United Food & Commercial Workers International Union, Local Union 175, Respondent, v. **Beaton Supersave Inc.**, Intervener; David Swain, Applicant, v. United Food & Commercial Workers International Union, Local Union 633, Respondent, v. Beaton Supersave Inc., Intervener; Robert D. Pursel, Applicant, v. United Food & Commercial Workers International Union Local 633, Respondent, v. 404199 Ontario Inc., carrying on business as Cartwright Supersave, Intervener; Randy L. Wright, Applicant, v. United Food & Commercial Workers International Union Local 75, Respondent, v. 404199 Ontario Inc., carrying on business as Cartwright Supersave, Intervener; John Carvalho, Applicant, v. United Food & Commercial Workers International Union Local 175, Respondent, v. 404199 Ontario Inc., carrying on business as Cartwright Supersave, Intervener

Sale of a Business – Termination – Union writing to purchaser specifying effect of successor provisions of Act – Not constituting notice to bargain within meaning of section 63(3) – Not rendering termination applications untimely

BEFORE: R. D. Howe, Vice-Chairman, and Board Members F. W. Murray and H. Kobryn.

APPEARANCES: *Peter Lockyer, Peter Spence and Kevin Bartlett, for Kevin Bartlett; Peter Lockyer, Peter Spence and David Swain for David Swain; D. Stephen Jovanovic and John Cavalho for John Cavalho; D. Stephen Jovanovic and Robert D. Pursel for Robert D. Pursel; D. Stephen Jovanovic and Randy L. Wright for Randy L. Wright; Harold F. Caley, David A. McKee, Denis Sexton and Bud Adam for Locals 633 and 175; George W. King and Ron Beaton for Beaton Supersave Inc.; George W. King and Lyle Cartwright for 404199 Ontario Inc.*

DECISION OF THE BOARD; August 22, 1983

1. File No. 0696-83-R is an application under section 63 of the *Labour Relations Act* in which the applicant Kevin Bartlett contends that a sale of a business by Gordons Markets, a Division of Zehrmart Limited ("Gordons"), to Beaton Supersave Inc. ("Beaton") took place on or about May 2, 1983, and requests the Board to exercise its power under section 63(4)(c) to define the composition of the "like bargaining unit" (for employees other than meat department employees). File No. 0697-83-R is a similar application pertaining to meat department employees. File Nos. 0702-83-R and 0703-83-R are applications under section 57 of the Act for declarations that the respondent local unions (referred to in this decision as the "union", or as "Locals 633 and 175") no longer represent the employees in the respective bargaining units for which they are the bargaining agents. File Nos. 0705-83-R, 0706-83-R,

and 0707-83-R are termination applications under section 57 in respect of the meat department employees, part-time employees (and students), and full-time employees of 404199 Ontario Inc., carrying on business as Cartwright Supersave ("Cartwright") for whom Locals 633 and 175, respectively, have allegedly obtained bargaining rights as a result of a sale of a business by Gordons to Cartwright.

2. Counsel for Locals 633 and 175 contends that his clients have given notice to bargain under section 63(3) of the Act and that, as a result, each of the aforementioned termination applications is untimely by virtue of section 63(10), read in conjunction with section 57 of the Act. Counsel for the other parties submit, on the other hand, that no such notice has been given. Moreover, counsel for the termination applicants submit, in the alternative, that even if a notice has been given under section 63(3), such notice does not have the effect of closing the collective agreement "open period". On the agreement of the parties, on August 8, 1983 the Board heard the evidence and representations of all of the parties to these various applications, concerning those issues. Union counsel also reserved the right to argue in the alternative at a later date, if necessary, that the termination applications are untimely because Beaton and Gordons are carrying on associated or related activities under common control or direction and should, therefore, be found by the Board to be one employer under section 1(4) of the *Labour Relations Act*. He also reserved the right to rely upon section 1(4) at a later date (if necessary) in respect of Cartwright and Gordons.

3. In 1981, Gordons and Locals 175 and 633 entered into collective agreements covering full-time, part-time, and meat department employees, respectively. Each of those collective agreements came into force on July 10, 1981, and continued in force until July 9, 1983. Pursuant to its collective agreement covering Gordons' full-time employees, and in accordance with section 53 of the Act, on or about April 22, 1983 Local 175 gave Gordons the following written notice to bargain:

Please be advised that Local Union 175 hereby gives notice of its intent to open negotiations for the purpose of amendments and modifications to the current Collective Agreement (full-time).

I would appreciate hearing from you as to suitable dates to commence negotiations.

Yours very truly,

(signed)
W.E. HANLEY
 President
 Ontario Retail Council

Similar notice was given at or about that time by Local 175 in respect of the "part-time" collective agreement, and by Local 633 in respect of the "meat department" collective agreement. The union subsequently applied for and obtained the appointment of a conciliation officer pursuant to section 16 of the Act.

4. It is common ground among the parties that there has been a sale of a business, within the meaning of section 63 of the Act, by Gordons to Beaton in respect of the Gordons

store at 46 Main Street West in Ridgetown, Ontario. It is also common ground among the parties that there has been a sale of a business within the meaning of section 63 by Gordons to Cartwright in respect of the Gordons store at 22 Talbot Street in Wheatley, Ontario. For purposes of arguing the two issues presently before us, the parties further agreed that those sales took place on May 2, 1983, and May 9, 1983, respectively.

5. On May 25, 1983, Denis Sexton, the Secretary-Treasurer of the union's Ontario Retail Council, sent (by "double registered" mail) the following letter to Ron Beaton, the purchaser of Gordons' Ridgetown store:

We have been informed that you have taken over the operation of the closed Gordons Store at the above address.

As you are aware Locals 175 & 633 of the United Food and Commercial Workers International Union, holds [sic] the bargaining rights for all of the Gordons locations in Ontario, including this particular store.

It is our position that by virtue of Section 63 of the Ontario Labour Relations Act, Locals 175 & 633 hold the bargaining rights for all employees of this store. Those Successor Rights operate by virtue of the Act, so that no application need be made at the Ontario Labour Relations Board.

In accordance with the Act, it is the Union's position that, as operator(s) of this store, that you are bound by the Collective Agreement to which locals 175 & 633 is a party with Gordons Markets (a division of Zehrmart Ltd.), dated September 15th, 1981 and effective as of July 10th, 1981.

Would you please contact me in respect of a meeting to discuss the necessary arrangements for the application of the aforesaid Collective Agreement in this store. Should you fail to respond to this letter or should you fail to recognize Locals 175 & 633 Successor Rights, an application will be filed with the Ontario Labour Relations Board, to ensure that the rights of Locals 175 & 633 are protected.

Mr. Beaton received that letter on May 28, 1983. On May 26, 1983, Mr. Sexton sent an identical letter to Lyle Cartwright, the purchaser of Gordons' Wheatley store. That letter was also received on May 28, 1983.

6. Mr. Sexton testified that the purpose of his letters of May 25 and 26 was to inform the new owners that there was a collective agreement in force and that, under the law, the collective agreement flowed with the business in the case of a sale. He also testified that, in recognition of the fact that a small independent store is not the same as a large retail chain, he felt that it would be appropriate to sit down with the new owners to discuss their intentions and determine "how best to proceed from there". He told the Board that this would not necessarily involve the imposition of the existing collective agreement(s) since that might be "too heavy" for them. Although he expressed the opinion that the final paragraph of those letters was a notice to bargain, he conceded in cross-examination that the union's intention to meet

with the new owners and, if appropriate, to bargain a less onerous agreement, was not “spelled out” in the letters. He also conceded that the union’s intention “could have been made more clear”.

7. On or about June 10, 1983, Messrs. Beaton and Cartwright each mailed an identical response to Mr. Sexton’s letters, in the following terms:

I am in receipt of your letter dated May 25, 1983 relating to the Gordon Collective Agreement at this store.

I would be agreeable to setting a date for a meeting with you to discuss our mutual interest in this agreement.

I will await your reply as to possible dates for such a meeting.

After Mr. Sexton received those letters, he instructed Business Representative Bud Adam to follow up on them by setting up meetings with the new owners. Accordingly, Mr. Adam telephoned Mr. Beaton, and was referred to counsel (Mr. King) who was handling all such matters on Mr. Beaton’s behalf. Mr. Adam then attempted on two occasions to telephone Mr. King but was unable to speak with him as he was out of the office. Mr. Adam also attempted to telephone the Wheatley store but was advised that it had an unlisted telephone number. Although he intended to personally attend at that store to make arrangements for a meeting, other commitments precluded him from doing so. His efforts to arrange such meetings ceased after the union was notified of the aforementioned termination applications.

8. Section 63(3) provides as follows:

Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

Neither the Act nor the Board’s Rules of Procedure specify any particular form which must be used to effectively give notice to bargain under section 63(3). Moreover, as indicated by the Board in *Davidson-Walker Funeral Homes*, [1981] OLRB Rep. Oct. 1359, at paragraph 31, in determining whether a document constitutes written notice to bargain within the meaning of section 63(3), “substance must prevail over form if the Act is to be realistically applied”. Thus, a telegram which, among other things, requested counsel for the successor employer to advise the union if his client was prepared to meet with the union to finalize a collective agreement between the successor employer and the union on behalf of the bargaining unit employees of the operation in question, was held to be written notice to bargain

within the meaning of section 63(3). (In that case there was no collective agreement in force between the union and the predecessor employer at the time of the sale.) Moreover, notice need not expressly refer to section 63(3); see, for example, *Independent Paper Convertors Inc.*, [1979] OLRB Rep. March 207. In that case, the following letter was held to constitute proper notice under section 63(3):

We understand that sometime this year you purchased the business formerly carried on by Top Paper Products Ltd. As you may be aware Top Paper Products Ltd. had a collective agreement with our local which expired October 31, 1977. Notice to bargain under this collective agreement was sent to the prior employer on August 9, 1977 and we have had two meetings in an attempt to conclude a collective agreement.

Inasmuch as we have been unsuccessful in concluding a collective agreement we are enclosing the expired agreement and would be prepared to meet with you during the week of July 10, 1978 in order to attempt to conclude a collective agreement.

9. The giving of written notice to bargain pursuant to section 63(3) has important ramifications for the employer to whom it is given. It triggers the section 15 duty to meet within fifteen days from the giving of such notice (or within such further period as the parties agree upon), and to bargain in good faith and make every reasonable effort to make a collective agreement. Once it has been given, the Minister must appoint a conciliation officer upon the request of either party: see section 16(1); cf. section 16(2). Such notice also triggers the section 79(1) "statutory freeze" which precludes (for the period specified therein) the successor employer from altering, without the consent of the union, the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer, the union, or the employees. (For such freeze to bind the successor employer following a sale of a business, notice to bargain must be given to the successor employer under section 63(3), even if the predecessor employer was bound by the section 79(1) "freeze" at the time of the sale: see, for example, *Oxford Manor Rest Home*, [1980] OLRB Rep. Dec. 1786, and *The Winchester Press Limited*, [1982] OLRB Rep. Feb. 284.) Moreover, by virtue of section 63(10) of the Act, the giving of such notice has, for the purposes of sections 5, 57, 59, 61, and 123, "the same effect as a certificate under section 7". Thus, in *Independent Paper Convertors Inc.*, *supra*, the Board held that no termination application can be made within one year of the giving of notice to bargain to a successor employer pursuant to (what is now) section 63(3). (In that case, the notice to bargain was given after the expiry of the collective agreement that had been in force between the union and the predecessor employer.) See also *Vaunclair Meats Limited*, [1981] OLRB Rep. Aug. 1186.

10. While we agree with union counsel that "substance must prevail over form" in determining whether a letter or other document constitutes a section 63(3) notice to bargain, in view of the significant legal rights, duties, and responsibilities triggered by a section 63 notice to bargain, we are of the view that, as a matter of labour relations policy, it is essential that a document which a trade union asserts to have effected such notice, should clearly be, in substance, a notice of the union's desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation. Having carefully considered the submissions of the parties, we are not satisfied that the union's letters of May 25 and 26 are, in substance, notices to bargain. While Mr. Sexton may have

intended them to be such notices, on a fair reading of those letters as a whole, it is apparent that they merely inform the purchasers of the effect of section 63(2) on the union's existing bargaining rights and collective agreements, and request "a meeting", the specified purpose of which is "to discuss the necessary arrangements for the application of the [July 10, 1981 to July 9, 1983] collective agreement in [the stores in question]". They do not, as a matter of substance, notify the successor employers of a desire on the part of the union to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation. As noted by opposing counsel, there is a striking contrast between the clear and unequivocal wording of the union's letter of April 22, 1983 to Gordons, by which it specifically gave "notice of its intent to open negotiations for the purpose of amendments and modifications" to the collective agreement, and the language contained in the union's letters of May 25 and 26. Thus, the letter of April 22nd demonstrates that the union was able to give clear and unequivocal notice to bargain, and underlines the inadequacy of the letters upon which it is attempting to rely in the present case for that purpose.

11. For the foregoing reasons, the Board finds that the aforementioned letters do not constitute notices to bargain within the meaning of section 63(3) of the Act and, therefore, do not render the aforementioned termination applications untimely. In view of that finding, it is unnecessary to determine the issue of whether a section 63(3) notice can effectively close a collective agreement "open period".

12. The parties are in agreement that if the union intends to pursue its request for declarations under section 1(4), that matter should be dealt with by the Board prior to embarking upon a hearing of the merits of the termination applications. Accordingly, if within one week of the date of this decision union counsel notifies the Board (in writing) that his clients intend to pursue their requests for section 1(4) declarations, these files will be scheduled for hearing for the purpose of hearing the evidence and representations of the parties with respect to that matter. Otherwise, the files will be scheduled for hearing for the purpose of hearing the evidence and representations of the parties with respect to all other matters arising out of and incidental to these applications.

13. These matters are hereby referred to the Registrar.

0775-83-R; 0776-83-R Service Employees Union, Local 204, Affiliated with the A.F. of L., C.I.O., C.L.C., Applicant, v. **Bestview Holdings Limited**, Respondent, v. Christian Labour Association of Canada, Intervener

Bargaining Unit – Practice and Procedure – Voluntary Recognition – Voluntary recognition sweeping in present employees not valid unless majority of them supported union – “Bargaining Unit” in section 60(1) means added on portion – Board not striking down agreement reached to expand unit by voluntary recognition before any employees employed in added on portion – Facts disclosing employees hired prior to voluntary recognition – Union failing to establish majority support at time of recognition – No bar to certification application by applicant

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members I. M. Stamp and C. A. Ballentine.

APPEARANCES: *L. A. Richmond, R. DeGroot and A. Ferens for the applicant; George Longo and Robert Perkins for the respondent; W. R. Herridge, Q.C., F. Heerena and D. Miller for the intervener.*

DECISION OF THE BOARD; August 29, 1983

1. The Board directs the above applications be consolidated.
2. This is an application by the Service Employees Union, Local 204, (SEIU), to be certified as bargaining agent for employees working at a nursing home in Etobicoke opened in the spring of 1983.
3. The respondents, Bestview Services Limited and Bestview Holdings Limited, together operate a number of nursing homes in centres around Ontario. Bestview Services Limited usually employs the housekeeping, laundry and kitchen staff, and Non-registered nurses, physiotherapists and craft employees are engaged by Bestview Holdings Limited. In *Bestview Holdings Limited*, [1983] OLRB Rep. Feb. 185, the respondents conceded and, pursuant to section 1(4) of the Act, the Board declared they were one employer. The applicant contended this declaration also applies to the present proceeding, and the respondents did not object. Consequently, we will treat them as one employer and will refer to them as Bestview.
4. The Christian Labour Association of Canada (CLAC) represents all or some of Bestview's employees at six other nursing homes in Ontario. SEIU presently is the bargaining agent for nursing staff at the Orillia home, and the Canadian Union of Public Employees represents kitchen employees in St. Catharines.
5. CLAC has filed an intervention, contending it already represents the employees at Etobicoke. This claim rests upon a certificate issued in January 1974, a collective agreement executed in February 1982, and a subsidiary agreement concluded in April, 1983. The employer took no part in these proceedings concerning CLAC's status at the Etobicoke home.
6. The certificate is dated January 18, 1974 and defines the bargaining unit as “all employees of Bestview Holdings Limited at its Bestview Lodge Nursing Home in the Municipality of Metropolitan Toronto” with some exclusions which are not relevant.

7. The earliest collective agreement introduced into evidence is dated September 17, 1979. The recognition clause defines the bargaining unit as “all employees as outlined in the ‘Preamble’, and as specified in Schedule ‘B’”, with exceptions which are not relevant. Schedule “B” lists several classifications. The preamble reads as follows:

“WHEREAS the Ontario Labour Relations Board did on the following dates and at the following locations:

March 27, 1973	Sarnia Ontario
May 2, 1973	St. Catharines, Ontario
August 3, 1973	Markham, Ontario
January 18, 1974	Toronto, Ontario

certify the Union as the bargaining agent for certain employees of Bestview Holdings Limited;

AND WHEREAS Bestview Holdings Limited has voluntarily recognized the Union as the bargaining agent for certain employees in the following location:

Newmarket, Ontario October 1, 1974

AND WHEREAS Bestview Services Limited has voluntarily recognized the Union as the bargaining agent for certain employees in the following locations:

Sarnia, Ontario
Markham, Ontario
Toronto, Ontario
Newmarket, Ontario

AND WHEREAS the Ontario Labour Relations Board did on the following date and at the following location:

April 4, 1974 Orillia, Ontario

certify the Union as the bargaining agent for certain employees of Bestview Services Limited;

AND WHEREAS the parties hereto have agreed to enter into a collective bargaining agreement upon the terms hereinafter set forth;

NOW THEREFORE THIS AGREEMENT WITNESSETH:”

The February, 1982 agreement between Bestview and CLAC applies to “all employees and locations as outlined in Schedule ‘B’”, again with exceptions which are not relevant. Schedule “B” provides:

This Collective Agreement applies to Employees of the Employer working in the classifications as outlined below in the Employer's Nursing Homes at the following locations:

SARNIA:

Kitchen
Housekeeping
Laundry

Nursing Aides
Crafts
Physio-Therapy

Health Care Aides

Assistant Cook

Cook

R.N.A.

ST. CATHARINES:

Housekeeping
Laundry

Nursing Aides
Crafts
Physio-Therapy

Health Care Aides

R.N.A.

TORONTO:

Kitchen
Housekeeping
Laundry

Nursing Aides
Crafts
Physio-Therapy

Health Care Aides

Assistant Cook

Cook

R.N.A.

MARKHAM:

Kitchen
Housekeeping
Laundry

Nursing Aides
Crafts
Physio-Therapy

Health Care Aides

Assistant Cook

Cook

R.N.A.

ORILLA:

Kitchen
Housekeeping
Laundry

Assistant Cook

Cook

NEWMARKET:

Kitchen
Housekeeping
Laundry

Nursing Aides
Crafts
Physio-Therapy

Health Care Aides

Assistant Cook

Cook

R.N.A."

8. Mr. Fred Heerena, a CLAC business agent since 1974, gave evidence about the events surrounding the opening of the Etobicoke home in the spring of 1983. Mr. Heerena is stationed in St. Catharines, and is involved in the day to day labour relations of employees in that city. From 1976 to present, he has also co-ordinated the dealings of business agents in other centres with Bestview. He participated in the negotiation of the 1979 and 1982 collective agreements.

9. Mr. Heerena could not recall any discussions occurring from 1976 until the spring of 1983, between Bestview and CLAC, about the scope of bargaining rights in Toronto. The first such exchange took place on March 15, 1983. Fred Heerena was aware of the impending start-up in Etobicoke, and he raised the topic at a second-stage grievance meeting at Bestview's head office. Heerena told Mr. George Longo the 1982 collective agreement would cover this operation when a workforce was hired. Mr. Longo said he might be prepared to agree, but he had other concerns to talk about. George Longo asked for a "wage break" at Etobicoke for a period of one year to off-set start-up costs. He suggested SEIU would be willing to make this concession, and said he was going to approach the rival union. Mr. Heerena declined to accept the bargain which Mr. Longo proposed, but they met again during the first week of April. Heerena reiterated CLAC's claim to the Etobicoke home under the 1982 agreement, rejecting the idea of a wage concession. Londo announced "the unions would have to fight it out". At this point CLAC reconsidered its position. It had earlier sought legal advice and was concerned that it was heading towards costly legal proceedings. CLAC was also anxious to protect the interests of employees at other homes who had expressed a desire to use the transfer provisions in the master agreement to move to Etobicoke. Mr. Heerena testified these concerns led CLAC to agree to a wage concession in exchange of Bestview's acknowledgment of CLAC's pre-existing bargaining rights in Etobicoke.

10. On April 22, 1983 CLAC and Bestview reached agreement on the terms of three subsidiary contracts. One relates to the general workforce and addressed a range of topics. It extends the expiry date of the 1982 master agreement from March 31, 1983 to March 31, 1984, as required by the *Inflation Restraint Act*, S.O. 1982, c. 55 and calls for wages increases in conformity with that Act. The other two agreements focus upon Etobicoke employees. The first purports to clarify the meaning of the word Toronto in the 1982 contract:

"The parties wish to clarify Schedule 'B' to the Collective Agreement. THEREFORE, the parties hereto agree that the location 'Toronto' referred to in Schedule 'B' means the Municipality of Metropolitan Toronto."

The remaining agreement of April 22nd provides that the wage rates set out in the 1982 master agreement, unadjusted for inflation, apply from April 23 to December 31, 1983 to employees hired after April 22, 1983 to work at the James L. Arnott Nursing Home in Etobicoke. Although the terms of the two agreements relating to the Etobicoke home were settled on April 22, 1983, these contracts were not reduced to writing until a later date. On April 28th, Fred Heerena received the written agreements from counsel, signed for CLAC, and forwarded the documents to Bestview. The employer signed the contracts on May 3rd.

11. There were no employees at the Etobicoke Home on April 22, 1983. On April 26th or 27th, an orientation program began for employees of the James L. Arnott Nursing Home,

and it opened its doors for business in May. Prior to this time, the employer operated only one home in each of the centres referred to above.

12. The number of persons employed at each location is as follows:

Sarnia	47
Markham	26
St. Catherines	100
Orillia	15
Newmarket	39
Main Street	66
Etobicoke	61

Approximately five of the sixty-one Etobicoke employees transferred there from other Bestview Homes pursuant to the master contract.

13. Mr. Heerena also described the structure of collective bargaining between Bestview and CLAC. A master agreement applies to all homes. CLAC is represented at the bargaining table by a committee made up of business agents and at least two employees from each location. All employees comprise one large constituency for the purpose of ratification votes. Administration of the contract is a local matter, subject only to the coordinating role performed by Fred Heerena.

14. The submissions made by counsel for CLAC centre around three alternative arguments. The 1974 certificate gives CLAC bargaining rights for all of Metropolitan Toronto. The 1982 collective agreement has the same effect. The two 1983 subsidiary agreements which address the Etobicoke home, either explicitly or implicitly, constitute a valid voluntary recognition.

15. Counsel for SEIU disputed CLAC's reading of both the 1974 certificate and the 1982 collective agreement. He also impugned any voluntary recognition agreement entered into during the spring of 1983 on two grounds. First, it was executed before there were any employees at Etobicoke and, therefore, at a time when CLAC did not enjoy the support of Etobicoke employees. Secondly, the employer acted out of favouritism for CLAC over SEIU. Finally, counsel contended that rates of pay at the Etobicoke home are lower than allowed by the *Inflation Restraint Act*.

16. Before turning to the wording of the certificate, we offer a comment on its relevance. We doubt whether bargaining rights granted almost a decade ago continue to have any force independent of the current collective agreement. The parties are free, subject to the restraints discussed below, to agree to expand or contract the scope of the bargaining unit described in the certification. See *Beverage Dispensers & Culinary Workers Union v Terra Nova Motor Inn Ltd.*, (1974), 50 D.L.R. (2d) 253 per Laskin C.J.C. The primary significance of the certificate at this point in time is as an aid to interpreting the collective agreement.

17. The certificate refers to "all employees of Bestview Holdings Limited at its Bestview Lodge Nursing Home in the Municipality of Metropolitan Toronto". This bargaining unit description departs from the Board's usual practice in setting the territorial limits of bargaining rights. Most certificates refer only to a municipality. The transfer of a workforce from

one location to another within the municipality does not defeat a certificate worded in this way. Moreover, such a certificate embraces a new, additional enterprise in the municipality. However, not all certificates are of this type. A certificate is typically restricted to a street address when an employer carries on operations at two locations in a municipality, a union applies to represent employees at only one, and they constitute an appropriate bargaining unit. In the past, a unit description narrower in scope than a municipality was occasionally granted in other circumstances, on the consent of the parties. The certificate in issue refers specifically to the Bestview Lodge Nursing Home, the name by which the Main Street home was known in 1974. This restriction has the same effect as referring to a street address in the sense that the certificate cannot embrace the home on Main Street as well as one in Etobicoke. Consequently, whatever the present force of the certificate, CLAC cannot found a claim to the Etobicoke home upon it.

18. Two agreements focus upon Etobicoke employees. The first purports to clarify the meaning of the word Toronto in the City of Toronto and Metropolitan Toronto. To resolve this ambiguity we must turn to the 1979 contract and to the 1974 certificate. The 1979 agreement defines the bargaining unit by reference both to the 1974 certificate for employees of Bestview Holdings Limited at Toronto and to the voluntary recognition agreement for employees of Bestview Services Limited at Toronto. Insofar as employees of Bestview Holdings Limited in Toronto are concerned, the clear inference is that the bargaining unit described in the 1979 contract is the same as the one set out in the certificate. In other words, Toronto refers to the nursing home on Main Street. The parties must have intended Toronto to have the same meaning in the context of the voluntary recognition agreement between Bestview Services Limited and CLAC. The 1982 contract also refers to Toronto, but not to the certificate. We must assume the parties intended the word Toronto to mean the same in 1982 as in 1979, in the absence of any evidence of a contrary intention. There is no such evidence. Indeed, Mr. Heerena testified the scope of bargaining rights was not discussed from 1976 to the spring of 1983. CLAC is not granted bargaining rights for Metropolitan Toronto by the 1982 agreement.

19. Two of the subsidiary collective agreements of April 22, 1983 do recognize CLAC as bargaining agent for employees at the Etobicoke home. These agreements are subject to challenge under section 60. It provides:

“60.-(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.”

The Board has repeatedly stated a union is not “entitled to represent the employees in the bargaining unit”, within the meaning of section 60, unless a majority of them have demonstrated their support for the union. See *T R S Food Services Limited*, [1980] OLRB Rep. Mar. 360 and the cases cited therein.

20. CLAC contends the bargaining unit referred to in section 60 is the overall unit comprised of seven nursing homes. In *Bestview Holdings, supra*, the Board ruled the six homes covered by the 1979 master agreement comprised a single bargaining unit. (The result of that decision was a raid by SEIU at the Main Street home failed, because the union had inadequate support in the larger unit.) From SEIU’s point of view, the bargaining unit under section 60 is the Etobicoke home. In short, the parties disagree about what unit is to be looked to when section 60 is applied to a voluntary recognition agreement which pushes out the boundaries of an existing unit.

21. The starting point for resolving this issue is a distinction between an agreement that adds present employees to a bargaining unit and the expansion of a unit before there are any employees in the addition. Consider first the case of present employees.

22. The Board on several occasions has been faced with a voluntary recognition that expands bargaining rights. In some cases the Board has looked to the enlarged unit, and in others the constituency considered was the addition to the unit. Significantly, the outcome never depended upon a choice between the two. The voluntary recognition in *Metcalfe Realty Company*, [1965] OLRB Rep. Sept. 385 included additional classifications in the bargaining unit. For the purpose of determining employee support, the Board expressly chose the larger over the smaller unit, but gave no reasons. However, the union did not demonstrate that it represented a majority of employees in either constituency. *Metcalfe Realty* was cited with approval in *John Beggins Re UAW*, [1981] OLRB Rep. Dec. 1803, where a bargaining unit was expanded, but employees affected were allowed to opt out. A section 60 application was filed by an employee who had exercised this option, and it was dismissed because the applicant was not in the unit. The Board went on to say that the application would have failed in any event, because the union was supported by a majority of employees in the new expanded unit. The overall unit was again looked to in *Warren Bitulithic Limited*, [1982] OLRB Rep. Sept. 1375. However, the Board did not consider the possibility of a different constituency. Moreover, this determination did not effect the outcome of the case, because the union did not enjoy majority support either in the overall unit or among the new group of additional employees.

23. These cases may be contrasted with two others in which the Board upheld an agree-

ment to enlarge an existing unit on the grounds that a majority of the employees in the new portion of the unit supported the union. See *Acme Paper Products Company*, [1968] OLRB Rep. Dec. 888 and the *Doctors Hospital*, [1972] OLRB Rep. May 401.

24. Our interpretation of section 60(1) should be informed by an appreciation of the role played by majority rule in the larger scheme of the *Labour Relations Act*. Majoritarianism is a basic tenet in the creation of brand new bargaining units, by either certificate or voluntary recognition. A union applying for certification need only demonstrate overall majority support in a unit determined to be appropriate for collective bargaining. A dissident group must abide by the will of the majority. When a unit is created by voluntary recognition, its parameters are set by the parties, and a majority within these boundaries prevails once again. At first blush, these observations might seem to lend credence to the overall majority test adopted in *Metcalf Realty*, *supra*, for voluntary recognition agreements which expand a bargaining unit. But any similarities between the creation of bargaining rights by certification, a fresh voluntary recognition, and an agreement to expand on existing unit prove to be very shallow when the surface is penetrated.

25. Consider first the opportunity for present employees to participate in shaping a decision which will have a crucial effect on their employment. In the certification process, a union must campaign to win the hearts and minds of employees, and all or most of them are likely to be aware of an organizing drive. They are able to engage in the ensuing debate over the strengths and weaknesses of this union, and perhaps its rivals, and thereby may influence the outcome. When a new bargaining unit is created by voluntary recognition, section 60 ensures affected employees a similar opportunity to participate in determining their own fate. The union must be able to show a majority of employees want to be represented by it. The evidence of support may take the form of attending a meeting to establish the union and ratifying a collective agreement. (See *Gilbarco Canada Ltd.*, [1971] OLRB Rep. Mar. 155.) These group activities provide a forum for an exchange of views among employees. The expansion of a bargaining unit by voluntary recognition, on the strength of an overall majority in the enlarged unit, presents a very different picture. The union can achieve its objective by relying upon employees in the old unit, and need not even give advance notice to a smaller number of employees in the increment.

26. The size of the bargaining unit is another important consideration. The larger is the unit, the greater is the tension between majority rule and self-determination for a small group of employees with a different point of view. The Board has recognized the importance of self-determination in the certification process. In *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1251, employees at one of several stores in a municipality had expressed a desire to bargaining collectively, but they were outnumbered by co-workers elsewhere who had not. A single store was found to be an appropriate unit in these circumstances. The converse situation is of greater interest for present purposes. Employees at one location may not want to be represented by a trade union which is supported by all other employees. As noted above, the typical certificate coincides with the boundaries of a municipality. If most of the employees in this unit embrace collective bargaining, the others are bound by this decision. The other side of the coin is that employees in one municipality, who want a particular union, cannot sweep in a minority in another municipality, who reject that union and perhaps collective bargaining in general. This limit on majority rule is discussed in *Bruce Peninsula & District Memorial Hospital*, [1982] OLRB Rep. May 656, at para. 7, and *Adams Furniture Co. Limited*, [1975] OLRB Rep. June 491, at paras. 7 and 8. Municipal boundaries were not set

down to strike an appropriate balance between majority rule and self-determination in the labour relations setting. The resulting compromise varies from case to case – depending upon the dimensions of a municipality, the location of each enterprise and the size of workforces – but at least some bound is placed on majoritarianism. This constraint is missing in voluntary recognition.

27. The next point of comparison is the composition of the bargaining unit. The more disparate are the interests of employees in the unit, the less effectively can a bargaining agent represent all groups. Insufficient attention to special interests not only prejudices some employees, but also may create a recruitment problem for management. To meet these concerns the Board will not throw together employees who lack a community of interest. For example, plant and office employees are segregated in separate bargaining units: see *H Gray Limited*, 55 CLLC ¶18,011. The community of interest test, in an important sense, is a check on majority rule. The community of interest safeguard is significant when an existing bargaining unit is expanded to embrace unorganized employees. A history of collective bargaining by one group, but not the other, may create a divergence of interests. The community of interest criterion is not applied when a union and employer enter into a voluntary recognition agreement to expand a unit.

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.

29. How is self-determination and community of interest reconciled with consolidated bargaining in the certification process? The *K Mart* decision, *supra*, at paras. 18 to 20, provides an apt illustration. The employer operated four stores in one municipality, the union had organized one at which 127 employees worked, and a certificate was granted for this unit. A broader-based structure was rejected, because it might significantly impede access to collective bargaining. However, the Board suggested it would have been “hard pressed” not to certify a municipal unit if the union had organized all four stores, suggesting a consolidated structure would lead to more effective collective bargaining than several smaller units. In other words, the viability of ongoing collective bargaining was compromised to this extent in order to foster self-determination. But the Board declared that self-determination would not always come out on top. One example used to make this point involved an employer operating fast food outlets at several locations in a municipality and employing at each a substantially smaller number

of employees then worked at one K Mart store. The Board strongly hinted that an application for a bargaining unit comprised of one outlet would be rejected.

30. The differences between a certificate and fresh voluntary recognition, on the one hand, and an agreement enlarging an existing agreement, on the other, can be briefly summarized. Present employees can participate in a certification campaign. Majority rule is tempered by the notions of community of interest and self-determination, subject to a countervailing concern for viable bargaining structures. The creation of a new unit by voluntary recognition also entails employee participation. But all of these safeguards are absent in the context of a recognition agreement that expands bargaining rights if the litmus test is an overall majority.

31. Section 60(1) does not compel this result. In interpreting this section, one must remember that the legislative draftsman had the paradigm voluntary recognition agreement in mind. That agreement creates a brand new bargaining unit. In this context, there can be no dispute about what unit is to be looked to for the purpose of measuring support for the union. The statutory language fits an agreement expanding a unit imperfectly. Reference to the bargaining unit prompts the question which bargaining unit – the enlarged unit or the new addition? The parties have already agreed to the larger bargaining unit and, if the voluntary recognition survives, this will continue to be the unit for the purpose of collective bargaining. For these reasons, one may be tempted to say the expanded bargaining unit is the one to which section 60(1) refers. But the words of section 60(1) take on another meaning when the underlying purpose is borne in mind. In the paradigm case, section 60 allows the employees for whom a union is granted bargaining rights to challenge the voluntary recognition. The only employees who inherit a bargaining agent when an existing unit is expanded are those who are newly added. In this sense, they are the group of employees, or the bargaining unit, effected by the challenged agreement. A strong argument can be made that this is the bargaining unit to which section 60 refers. Any remaining ambiguity should be resolved by adopting the interpretation which meshes best with the general framework of the *Labour Relations Act*. Certification, the primary mechanism for creating bargaining rights, allows employees to participate in making a majority decision and also places some limits on majoritarianism. As an alternative to certification, voluntary recognition occurs outside the Board's purview, but the Act provides a mechanism for retrospective review. In the paradigm case, voluntary recognition also entails employee participation. Turning to the penumbral case of an agreement to expand bargaining rights, we prefer the interpretation of section 60(1) that grants employees this same procedural safeguard. Consequently, the word bargaining unit in section 60(1) must be read to mean the addition to an existing unit. A voluntary recognition agreement is not valid unless a majority of the additional employees support the union. *Metcalf Realty, supra*, should not be followed.

32. Our reading of section 60(1) is consistent with the treatment of employees who are added to an existing unit by means other than voluntary recognition. In the federal jurisdiction and in British Columbia, the labour relations board sometimes expands an existing unit upon application by the incumbent union, but only if a majority of the additional employees so desire. See *Olivetti Canada Ltd.*, [1975] 1 Can. LRBR 60 (B.C.); *Reliance Lumber Co.*, [1975] 1 Can. LRBR 101 (B.C.); *Automatic Electric (Canada) Limited*, [1976] 2 Can. LRBR 97 (B.C.); *British Columbia Telephone Company*, [1978] 2 Can. LRBR 387 (Can.). The notion that employees cannot be added to a bargaining unit without reference to their desires has also found favour with the courts. See *Board of School Trustees of School District 57 (Prince*

George) v. *IUOE*, [1974] 1 WWR 197 (B.C.S.C.); and *University of Saskatchewan v. CUPE*, 78 CLLC ¶14,159 (S.C.C.). The approach followed in these cases is discussed with approval in Langille, "Developments in Labour Law: The 1980-81 Term" (1982), 3 Supreme Court L.R. 323, at 339 to 341.

33. We now shift our focus from an agreement that adds present employees to an existing bargaining unit to a voluntary recognition entered into before there are any employees in the new component added to an old unit. In this context, only future employees are affected. Their stake in the creation of bargaining rights is much weaker than that of the present work force. The reason is obvious. A person who is already employed when a bargaining agent is recognized has no real choice about union representation. The only way for this employee to escape the union is to quit, leaving behind seniority rights and perhaps also benefit entitlements and disrupting personal life. By contrast, an employee who enters an existing bargaining unit, knowing at the time of hire that a union is tied to the job, can avoid the trade union by not accepting employment. This difference between today's employees and tomorrow's work force becomes highly significant when self-determination is balanced against the dangers of a fragmented bargaining structure.

34. In the certification process, the interests of future employees are assigned less weight than the concerns of present employees. A certificate embraces all those who enter the unit after certification is granted, regardless of their views about collective bargaining. However, the prospective reach of a certificate is limited, at least to some degree, by community of interest and municipal boundaries. For example, a plant unit includes new classification of a production variety but not new office jobs. Similarly, the typical bargaining unit is defined by reference to one municipality, and so does not encompass employees hired in another. A desire to preserve the autonomy of tomorrow's work force is one reason for defining bargaining units in this way. See *Canada Safeway Limited*, [1972] OLRB Rep. Mar. 262, at paragraphs 3 and 4 and *K Mart*, *supra*, at paragraph 9. But subject only to these loose constraints, future employees are swept into an existing unit to avoid undue fragmentation.

35. What about a voluntary recognition agreement that expands a bargaining unit? In the context of present employees, we have already assigned a greater weight to self-determination than to consolidated bargaining, by ruling that a group of employees cannot be added to an existing bargaining unit unless a majority of them wish to be. However, we believe that future employees should bow to the benefits of broadly based bargaining structures. A recognition agreement that expounds bargaining rights to encompass prospective employees should not be struck down.

36. This policy judgment can be comfortably accommodated by section 60(1). It states "the Board *may* ... declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit." In this setting, the bargaining unit is the addition to an existing unit and contains no employees at the crucial time. Consequently, the Board could make a declaration. But the word "may" clearly confers a discretion not to do so. For the reasons set out above, we believe a declaration would be inappropriate in these circumstances.

37. Under the approach we have described, the time when existing bargaining rights are expanded is crucial. An agreement made after there is a work force in place is subject to challenge, but a voluntary recognition that precedes the hiring of employees is not. The

reason for the difference is that employees come to the union in one situation, whereas the trade union comes to them in the other. With this rationale in mind, we can formulate the question that determines on what side of the line any particular case falls. At the time the work force was hired, were employees told, or could they reasonably be expected to have discovered, that their jobs entailed union representation? In other words, the determining factor is what employees knew or could have learned with reasonable effort. The precise moment at which a recognition agreement becomes legally binding is in itself not relevant.

38. We will briefly summarize our conclusions about the application of section 60 to the expansion of existing bargaining rights. The term bargaining unit means the addition to the old unit. An agreement that sweeps in present employees will be struck down pursuant to section 60(1) unless a majority of them support the union. But the Board will exercise its discretion under section 60(1) to uphold an agreement entered into before there are any employees in an addition to an existing bargaining unit.

39. In the case at hand, the Etobicoke employees began their orientation program on April 26 or 27. We do not know precisely when they were hired. Most of them were probably engaged before April 22 when CLAC and Bestview reached an oral agreement. In any event, they were at work before April 28 when the agreement was reduced to writing, and also before May 3 when it was signed by Bestview. On a balance of probabilities, we conclude the Etobicoke employees, when hired, were not told, and could not have with reasonable efforts discovered, that CLAC would be their bargaining agent. In these circumstances, the applicant, acting on behalf of employees, is entitled to invoke section 60 by calling upon CLAC and Bestview to demonstrate that a majority of employees supported CLAC at the time it was voluntarily recognized. As neither of these parties have discharged this onus, we declare CLAC was not, and is not, entitled to represent the Etobicoke employees.

40. Having arrived at this conclusion, there is no need to address SEIU's other attacks upon the voluntary recognition.

41. The application for certification is timely. We direct the Registrar to reconvene the hearing in this matter.

2492-82-U Canadian Union of Operating Engineers and General Workers, Complainant, v. Blue Line Taxi Company Limited, Respondent

Trade Union – Unfair Labour Practice – Employer deducting dues for all taxi drivers other than “replacement drivers” – Dispute whether replacement drivers within bargaining unit described in collective agreement – Whether reference to shift-drivers and spare-drivers including replacement drivers – language and practical considerations causing Board to find parties did not intend to include replacement drivers

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. H. Wightman and W. F. Rutherford.

APPEARANCES: *Grant A. Hartley, J. E. McKenna and Thomas P. Norton for the complainant; E. Rovet, Barry Edson and Wayne French for the respondent.*

DECISION OF THE BOARD; August 12, 1983

1. This is a complaint under section 89 of the *Labour Relations Act*. It relates to the scope of collective bargaining presently in force in the taxi industry in the City of Ottawa. The union complains that the respondent has interfered with its representation of taxi drivers for collective bargaining purposes by failing to deduct and remit union dues and by failing to provide the union information in relation to dues owing. It alleges that the employer has violated sections 43, 64, 66 and 68 of the *Labour Relations Act*. It requests compensation for dues which it alleges have not been paid as well as an order requiring the payment of dues in the future and full documentation upon which the calculation of dues will be based.

2. Blue Line Taxi Company Limited is a member of the Ottawa Taxi-Brokers and Owners Association. It is not disputed that it is the largest and most influential member of that association, which has been formed by all of the major taxi company owners and brokers in Ottawa for the purposes of collective bargaining.

3. Blue Line does not deny that it is in a collective bargaining relationship with the complainant union. It takes the position, however, that the taxi drivers in relation to whom the union seeks both dues and supporting records are not included in the bargaining unit. It bases its position on the voluntary recognition agreement entered into between the union and the association as well as the wording of the collective agreement. At the hearing both parties were agreed that those documents are clear and unambiguous and that the Board could make a determination on the merits of the complaint by reference to them, without the need for extrinsic evidence. The Board therefore heard the submissions of both parties on the interpretation of the voluntary recognition agreement and the existing collective agreement as they relate to the scope of the union's bargaining rights.

4. The initial voluntary recognition agreement was the result of the settlement of some seven applications for certification made by the union in the early part of 1981. The union applied for certification of taxi drivers of seven Ottawa companies pursuant to the dependent contractor provisions of the *Labour Relations Act*. With the assistance of a Labour Relations Officer the parties negotiated from June to September of 1981, at which point they concluded

a voluntary recognition agreement. The voluntary recognition agreement, dated September 11, 1981 contains the following provisions:

1. The Association (The constituent members of which are set forth on Schedule "A" attached hereto) recognizes the union as the sole bargaining agent for all single owner-operators and single plate lessees of the Association.
2. The Association agrees to commence good faith bargaining with the union with a view to achieving a single collective agreement for the bargaining unit described in paragraph one. For clarity persons included in the bargaining unit are set for [sic] on Schedule "B" attached hereto. (Approximately 320 members).
3. The obligation of the Association to bargain as a single employer shall continue for the period necessary to conclude an initial collective agreement and thereafter subject to the terms of the said collective agreement, provided the union is not in breach of certain obligations under this agreement.
4. It is agreed that individual members of the Association will deal with the Union on matters of administration in the collective agreement as it pertains to them.
5. Notwithstanding the right of the union to advance collective agreement proposals at the appropriate time of the renewal of the initial collective agreement that may concern themselves with the inclusion of rental drivers or spare drivers within the scope provisions of the bargaining unit description, the union agrees that neither it or its officers, agents, directors or employees will directly or indirectly bring or encourage or support another union, association or group of employees to bring an application for certification in respect of rental drivers or spare drivers for the period of the initial collective agreement. This provision shall be considered null and void only in the event another trade union with the support, encouragement or assistance of the union herein, seeks to represent the rental drivers and/or spare drivers before the Ontario Labour Relations Board during the period of the initial collective agreement.
6. If the union breaches clause five the Association's obligation to bargain as a single employer shall forthwith cease.

5. It is evident from Article 5 of the recognition agreement that the parties did not agree to include all taxi drivers in the bargaining unit. Without commenting on the dubious legality of the provision which purports to contract away the union's right to apply for certification under the Act for a group of unrepresented employees, it is clear that at that point there was a group of taxi drivers described as "rental drivers or spare drivers" who were excluded from the bargaining unit. It appears to be common ground, however, that the agreement reserved to the union the right to bargain, as expressed in Article 7, on the issue of

cab rent paid by those drivers, who are described in that article as “twelve hour and twenty-four hour shift drivers and spare drivers”.

6. It is useful at this point to briefly describe the various kinds of taxi drivers operating in the industry in Ottawa.

7. Two things are required to operate a taxi in Ottawa: a car and a taxi license or plate. If the taxi industry is compared to a pyramid the taxi brokers, like Blue Line, are at the top. They provide a dispatch system which regulates the work of cars which are owned by them and licensed in their name as well as cars which are owned by individuals who have their own plates. Some individual taxi owners may have several cars and plates registered in their name. They will employ other drivers to work for them through the dispatch service of a major broker like Blue Line. In a previous Board decision, *Windsor Airline Limousine Service*, [1981] OLRB Rep. Mar. 398; the Board determined that the entrepreneurial nature of multi-car owner operators excluded them from the definition of dependent contractor or employee within the meaning of the Act. It therefore ruled that they could not be included in a bargaining unit of employees. It appears that on the strength of that precedent the parties in the instant case did not seek to include multi-car owner operators in the bargaining unit.

8. The next level in the pyramid is the single plate owner-operator. These are taxi operators who own their own car and a single plate. They operate the cab either themselves or through a replacement driver, since a cab must be on the road a substantial number of hours to turn a profit. The single plate owner-operator will pay “stand rent” to a major dispatcher for the privilege of having the benefit of its radio or computer dispatch service and of displaying the roof sign of the dispatcher on his car.

9. Next there are taxi drivers generally referred to as “single plate lessees”. These individuals enter into an arrangement with taxi brokers who have surplus taxi plates. As there is a prohibition against leasing the plates separately, these individuals will enter an arrangement with the broker whereby they sell their car to the broker who then leases back both the car and plate to the lessee.

10. The next category of employee in the taxi industry is the individual who, for convenience, will be referred to as the rental driver. The rental driver does not own a car or a plate nor does he lease them. He enters one of two kinds of arrangements with the major brokers who have extra cars and plates which they want to put on the road. The first group of rental drivers are those who enter seven day rental agreements with the brokers, either on a twelve hour or a twenty-four hour per day basis. For a fixed rental fee over the seven day period they have the use of the car, plate and dispatching service of the broker for either the twelve or twenty-four hour period in each day. The second group of rental drivers are those who will rent cabs and plates from the brokers on a more irregular basis, typically for shorter periods or on weekends. They have greater flexibility than would be possible under the seven day rental and can thereby pick up extra income on a weekend or occasional basis. Students or persons with other regular employment would typically fall into this category.

11. The last category of employees in the taxi industry are the replacement drivers. These are individuals who make a private arrangement with the single plate owner-operator or the single plate lessee to drive his or her cab during hours when the operator is not behind the wheel. The replacement drivers are hired exclusively by the single plate owner-operators

or single plate lessees and it is exclusively with them that arrangements are made for the use of the cab, plate and dispatch service and subject to the governing by-law, the sharing of their revenues. The only relationship between the replacement drivers and the brokers is for the purposes of insurance. It is common ground that Blue Line, for example, offers insurance to owner-operators and plate lessees on a group basis. If the owner-operator or plate lessee takes advantage of that insurance it is a condition of the contract that the broker be aware of who is driving the car in question at all times. The replacement driver is, of course, also subject to the control of the radio or computer dispatch service.

12. It is important to distinguish the issue in this case from that which was before the Board in the *Windsor Airline Limousine* case cited above. In that case the Board was called upon to determine whether replacement drivers were employees for the purposes of an application for certification. In this case the issue of whether or not the replacement drivers are in an employment relationship with brokers such as Blue Line is not before the Board. No evidence was therefore adduced with respect to such factors as control and economic dependence as would assist the Board in making that determination. The sole issue in this complaint is whether the replacement drivers were intended by the parties to be employees as contemplated by the scope clause of the collective agreement. It is common ground that the single plate owner-operators, single plate lessees and both the seven day and irregular rental drivers are included in the bargaining unit. The only issue is whether those persons described above as "replacement drivers" were intended to be included.

13. That is the ground of contention. The respondent, like other brokers, has remitted dues and adequate documentation in respect of all taxi drivers except the replacement drivers. It is these individuals, whose numbers are substantial, which the association maintains are included in the bargaining unit and in relation to whom it maintains Blue Line has failed to remit union dues or supporting documentation which would allow the union to determine the amount of those dues.

14. The following provisions of the collective agreement are pertinent to the determination of the issue in this complaint:

- 1.01 The Association recognizes the Union as the sole and exclusive bargaining agent for all single plate owner-operators and single plate lessees working under a member of the Association within the meaning of the *Labour Relations Act* currently in force in the Province of Ontario, (collectively referred to hereafter as Taxi Operators).
- 1.02 The Association agrees to recognizing the Union as the sole and exclusive bargaining agent on the issue of cab rent, including cab rents paid by 12-hour and 24-hour shift drivers and spare drivers.
- 2.01 The Association shall use due diligence to provide the Union with all necessary information relating to the following matters on a current basis:
 - a) all the names of all its members and the plate numbers of all he City of Ottawa taxi licences to which each holds title;

- b) the names and titles of those members serving on the Executive of the Association.

- 5.01 All present taxi operators as a condition of employment, shall remain Union members in good standing if they are already Union members and, if they are not, shall become Union members within thirty (30) days after the signing of this agreement and shall remain members in good standing; all new taxi operators, as a condition of employment, shall become and remain members in good standing of the Union.
- 5.02 The Association agrees to collect all assessed Union dues, and to remit said dues to the Union no later than the eighth day from the day on which the stand rent is due.
- 5.03 Union dues for taxi operators will be assessed at \$15.00 per month. Union dues for taxi drivers will be assessed at \$0.50 for each shift worked.
- 12.01 The Union shall notify the Association, in writing, of the names of the shop stewards and alternates.
- 12.02 The Association shall use due diligence to provide the Union with all necessary information relating to the following matters for taxi operators within the bargaining unit on a current basis:
 - a) a list of taxi operators showing their names, addresses, car numbers and classifications, where possible.
- 12.03 Taxi operators in the bargaining unit shall have access to their personnel records at reasonable time, once every six (6) months and shall, upon request, be provided with copies of material contained in such records, which shall be corrected if inaccurate.
- 12.04 The Association shall provide bulletin boards at appropriate locations for the use of the Union, upon which the Union shall have the right to post notices relating to matters of interest to the Union and its members, where possible.
- 12.05 The responsible member of the Association agrees to acquaint [sic] all applicants with the fact that a collective agreement is in effect, and to introduce new taxi operators to their Union representatives so they can be advised of the terms and conditions set out in this agreement. A form letter will be provided by the Union for this purpose.
- 15.01 The responsible member of the Association shall ensure that any car rented to a taxi driver shall be:

- a) clean, only on his start date, and after that it is the operators responsibility;
 - b) communication equipment fully operational;
 - c) cab rent to be paid one day in advance;
 - d) if a rental car is in the garage due to a mechanical problem for a full shift, then that day's rent which was paid in advance be applied to the next day that the car is available for work.
- 18.02 Stand rent shall be paid to the responsible member of the Association.
- 18.03 All payment scheduling of plate rent and stand rent for taxi operators entered in Leasing Agreements will be paid in advance weekly or monthly, subject to the responsible member of the Association's company policy.
- 18.04 All payment scheduling of stand rent for taxi operators who are single plate owner/operators will be paid in advance monthly or other depending on the responsible member of the Association's company policy.
- 22.01 There will be an increase of \$15.00 per week upon the pending meter rate approval. The maximum plate rent per week shall be \$81.00.

15. We should indicate at the outset that we do not disagree with the position of the parties that this complaint can be resolved in light of the agreed facts by interpretation of the collective agreement without recourse to extrinsic evidence. The agreement clearly recognizes two distinct categories of employees: firstly, taxi operators, including single plate owner-operators and single plate lessees as described in Article 1.01 of the collective agreement and, secondly, rental drivers, including twelve and twenty-four hour shift drivers and spare drivers as described in Article 1.02 of the collective agreement. The narrow issue in this complaint is whether the reference to shift drivers and spare drivers in Article 1.02 can extend to include the replacement drivers described above.

16. It is plain from the collective agreement that there are no issues beyond cab rent, the cleanliness of cabs and the payment of union dues which are touched on in the collective agreement in relation to rental drivers. The collective agreement does not, however, make explicit provision for any amount in relation to cab rent. That would appear, to be regulated by the by-law of the City of Ottawa governing taxicabs and is, at best something for which the union can lobby. Presumably it would negotiate for a common front with the brokers' association at City Hall. The only substantive provision, therefore, affecting rental drivers appears to be the requirement for clean cabs, the time when cab rental is payable and the provision for the payment of dues at the rate of 50¢ for each shift worked as provided in Article 5.03 of the collective agreement.

17. The collective agreement contains no definition of “twelve hour and twenty-four hour shift drivers” or “spare drivers”. Article 1.02 of the collective agreement, however, interpreted in the context of the industry gives considerable guidance to the meaning of those terms. The drivers whose status under the collective agreement is an issue in this complaint, the replacement drivers, do not pay rent nor any other fees or assessments to Blue Line nor to the other brokers who form the association. There is, quite simply, no privity between them. It is not disputed, moreover, that there are two kinds of rental drivers, namely those who rent on a seven day basis and those who rent on an irregular basis, usually weekends. It is also not disputed that the twelve and twenty-four hour shift drivers rent from Blue Line on a seven day block basis. In our view, that would appear to leave the designation “spare drivers” to cover those persons who rent a cab and plate from the broker on an irregular basis. Absent more clear terminology we would not conclude that persons who come in to work irregular hours on an occasional or weekend basis would be described as “shift drivers”. It would also appear that the requirement that rental cabs be clean, aimed as it is at the association, suggests that the cab rental provisions are directed at rental drivers, and not replacement drivers.

18. A more purposive approach to the interpretation of the agreement points to the same conclusion. There is ample reason to conclude that the union negotiated with Blue Line a provision requiring Blue Line to deduct, at source, dues owing to the union in respect of rental drivers. This the respondent can easily do since it finds itself in a regular monetary transaction with the rental driver. It is in a position both to monitor the number of shifts worked by such drivers and, through the rental arrangement, to deduct union dues at source. The opposite is true with regard to the replacement drivers. The broker may have no contact with the replacement driver other than through the radio dispatch, or the computer dispatch system. It may not, in other words, be aware who is driving a given vehicle at any particular time nor be able to compute the number of shifts driven by a particular replacement driver. More importantly, as it has no financial dealing with the replacement driver, it is in no position either to deduct dues from him nor to police the amount of dues owing.

19. The Board is prepared to accept, as counsel for the union submits, that there must be room for creative developments in the implementation of collective bargaining in the taxi industry. There is no doubt that collective agreements in this industry will require the establishment of rights and duties not known in the more traditional sectors of industrial relations. The dependent contractor provisions of the *Labour Relations Act* and a number of the Board’s decisions in furtherance of those provisions show this Board’s recognition of that reality. The Board has demonstrated its willingness to adapt the conceptual framework of the *Labour Relations Act* to the taxi industry. Nor do we disagree that by a suitable contractual provision a mechanism might be established for the collection of dues from replacement drivers who, in the *Windsor Airline Limousine* case, were found to be employees for the purposes of the Act. It is not, however, for this Board to wish those kinds of contractual provisions into being or to imply their existence without any support in the language of a collective agreement.

20. If the Brokers Association and the union intended that the brokers should be responsible for the collection of dues from replacement drivers with whom they have virtually no contact it is our view that they would have done so in clear and unequivocal language, with a fairly categorical description of the collective mechanism for the enforcement of that obligation. The collective agreement between the parties to this complaint contains no such provision. When the words of the agreement are assessed against the factual context of the industry the Board is compelled to the conclusion that the parties did not intend to include

the replacement drivers within the scope of the bargaining unit nor to make provision for the payment of dues in relation to those drivers.

21. For the foregoing reasons the complaint must be dismissed. It should perhaps be noted that the Board's conclusion in no way limits the ability of the complainant to pursue voluntary recognition for the replacement drivers, assuming it has sufficient support among them. Nor should the Board's decision be taken as any endorsement of the purported bar on a certification application found in the initial voluntary recognition agreement. While the Board is not unaware of the practical difficulty of organizing the replacement drivers, it would appear that it could be done with the will and co-operation of the majority of single plate owner-operators and single plate lessees who comprise its membership. It is they who are in contact with the replacement drivers. They would be in the best position to advance an arrangement for the contribution of dues by the replacement drivers for the greater benefit of all. If, however, the union cannot itself achieve that end it must negotiate more explicit contract language for it to be done through the brokers' association. The material before the Board in the instant complaint establishes that neither the Association nor Blue Line has violated the *Labour Relations Act*.

0656-83-R Labourers' International Union of North America, Local 183, Applicant, v. **Bramalea Limited**, Respondent, v. Group of Employees, Objectors

Certification – Petition – Employer calling meeting during work time believed by employees to be obligatory – Employer announcing improvements in working conditions as part of ongoing reorganization – Distributing copies of Board form 6 at meeting – collectors soliciting signatures for petition during work hours – Total effect of circumstances tainting voluntariness of petition

BEFORE: Richard M. Brown, Vice-Chairman and Board Members B. L. Armstrong and I. M. Stamp.

APPEARANCES: *Roger Aveling and Marino Toppan for the applicant; John P. Sanderson, Q.C., David Ptak and Paul Reid for the respondent; Archie Blair and Robert N. Grandy for the objectors.*

DECISION OF THE BOARD; August 5, 1983

1. This is an application for certification in which the parties met with a Board Officer prior to the hearing, reached agreement on all matters in dispute between them, except the significance of a petition filed by the group of employees, and agreed to waive their right to a formal hearing on the agreed matters.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board finds the following bar-

gaining unit to be appropriate for collective bargaining: all employees of the respondent engaged in cleaning and maintenance, including resident superintendents, at 10 Kensington Road, 15 Eastbourne Drive, 37 Eastbourne Drive, 9 Lisa Road, 10 Lisa Road, 11 Lisa Road, 790 Clark Boulevard, 3 Knightsbridge Road, 11 Knightsbridge Road, 2 Silver Maple Court, 4 Silver Maple Court, 6 Silver Maple Court, 8 Silver Maple Court, 5 Kings Cross Road and 15 Balmoral Drive in the City of Brampton, save and except property manager and persons above the rank of property manager, and students employed during the school vacation period.

4. The applicant has filed documentary evidence which establishes that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on July 12, 1983, the terminal date fixed for this application and the date which the Board established, pursuant to section 103(2)(j) of the Act, to be the time for determining membership under section 7(1) of the Act. This evidence is in the form of membership cards containing a combination application for membership and receipt. The applications are signed by the individual employee concerned, and the receipt is countersigned by the collector and acknowledges the payment of one dollar. These cards comply with the membership criteria prescribed by section 1(1)(l) of the Act and established by the Board pursuant to section 103(2)(j). The documentary evidence of membership is supported by a properly completed Form 9, Statutory Declaration, attesting to its authenticity. There is nothing to suggest the employees who signed these cards did not do so because they decided of their own free will to be represented by the applicant. Accordingly, in the absence of other evidence relating to membership, the union has a sufficient level of support to be certified pursuant to section 7(3) of the Act without recourse to a vote.

5. However, a group of employees have also filed a petition signed by a number of people who are opposed to the certification of the applicant. This petition contains the names of some individuals who previously signed membership cards and paid one dollar to the applicant, and who thereby became members of the union within the meaning of section 1(1)(l) of the Act. Indeed, less than fifty-five per cent of the employees in the unit signed a card but did not sign the petition. Consequently, if the employees whose names appear on both a card and the petition signed the petition voluntarily, the Board would normally exercise its discretion under section 7(2) of the Act by ordering a vote. Conversely, a petition spawned by improper employer influence, either real or perceived, would be disregarded and would not preclude certification on the basis of membership evidence.

6. The Board's refusal to hold a vote in response to an involuntary petition is best understood when viewed against the backdrop of certification in the absence of a petition. Section 7 of the *Labour Relations Act* directs the Board to order a vote when a trade union demonstrates that between forty-five and fifty-five per cent of the employees in the bargaining unit are union members. However, the Board is empowered to issue a certificate, without a vote, upon application by a trade union which has signed more than fifty-five per cent of the employees, although the Board may conduct a vote. Over the years the Board's general policy has been not to order a vote in these circumstances. The vast majority of all certificates are granted on the basis of membership evidence. The Act has been amended on numerous occasions, but the Legislature has made no effort to change this practice. Indeed, in 1975 the statutory threshold for certification without a vote was lowered from sixty-five to fifty-five per cent. The decision to favour cards over votes in this way rests in large measure upon a judgement about the reliability of cards as an indicia of union support, the desirability of employer participation in an organizing campaign – cards may be signed before the employer knows of

the organizing drive but a vote cannot be held without notifying management – and the problems arising out of the delay inherent in an election supervised by the Board. These issues are canvassed in Weiler, *Reconcilable Differences* (Carswell: Toronto, 1980) at 37 to 49.

7. A petition signed by employees who had earlier become union members appears in a small minority of certification cases. A change of heart may be produced by a spirited debate among employees concerning the virtues of collective bargaining. In British Columbia and under the *Canada Labour Code* dialogue among employees is cut off when the union applies for certification. This is the date for determining the level of union support, and any shifts in allegiance after this time are disregarded. See *Plateau Mills Ltd.*, [1977] 1 Can. LRBR (B.C.) and *Canadian Imperial Bank of Commerce*, [1979] 1 Can LRBR 19 (Can.). A longer time frame for debate among employees is allowed in Ontario. The regulations issued under the Act call for the establishment of a terminal date – between five and ten days after the date of application – and direct the Board not to accept evidence relating to membership filed after the terminal date. A notice is posted in the work place setting out the terminal date and advising employees that any representations which they wish to make must be received by the Board before that time. A petition filed before the terminal date is taken into consideration so long as it is voluntary in the sense that the petitioners were not motivated by employer influence, either real or perceived. A voluntary petition which places a union's claim to be supported by more than fifty-five per cent of the employees in doubt, because some employees have signed a card first and then the petition, will normally result in a vote.

8. But an involuntary petition is of no assistance in determining how many employees want union representation. Instead this document is a gauge of the responsiveness of employees to employer influence. As the Board said in *Pigott Motors*, 63 CLLC ¶16,264:

“The Labour Relations Act contains detailed provisions designed to protect the rights of employees to become members of, and to select or reject a particular or any trade union as their collective bargaining agent and to bargain collectively or individually with their employer. It is an important function and duty of this Board under the legislation to be circumspect and vigilant to see that these rights are preserved and not made illusory.

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interest and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some

reasonable assurance that a document, such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories. (See for instance, the *Sinnott News Case*, CCH Canadian Labour Law Reporter, 1955-59, *Transfer Binder* ¶16,114 at p. 12,209, and the *Fleck Manufacturing Ltd.*, Case, CCH Canadian Labour Law Reporter, vol. 1, ¶16,236, at p. 13,201). In seeking this assurance, the Board draws no distinction between documents which purport to express a desire on the part of employees to resign from the union and those which purport merely to express opposition to the applicant as their collective bargaining agent. In other words, for this purpose, it does not seek to distinguish between the two matters of membership and representation.”

The reason why the Board does not order a vote in the context of an involuntary petition is obvious. In the absence of a petition, public policy has declared cards are a better indicia of union support than a vote, for the reasons alluded to above. An involuntary petition tips the scales even further in favour of documentary membership evidence over the ballot box.

9. Is the petition in this case voluntary? The Board heard evidence from the two employees who circulated the document – Archie Blair, a maintenance man and Bob Grandy, a resident superintendent who was hired one week before the application.

10. The scene opens on a meeting held in a recreation room in one of the employer’s apartment buildings at 10 Lisa Road, commencing at 11:00 a.m. on Tuesday, July 7. The meeting was called by the employer two or three days in advance and each employee received a written notice of it. In attendance were all, or almost all, of the employees in the bargaining unit. Frank Hammer, the maintenance manager, and Paul Reid, the general manager, were also there. Mr. Hammer is the immediate supervisor of all of these employees. The gathering lasted about one hour.

11. The employer handed out original copies of the Board’s Form 6, Notice to Employees of Application for Certification to the resident superintendents. They were told the notices were to be posted in their buildings until the following Tuesday. Morris Sullivan testified that Frank Hammer also said employees must respond by Tuesday, although the witness seemed not to be certain. Archie Blair did not recall Hammer saying this. According to Blair, Hammer told those present to read the form very carefully and said the decision of what to do in response to it was theirs to make.

12. Archie Blair testified there was discussion about problems employees had encountered in the course of doing their work. He gave as an example the difficulty experienced by some cleaners in obtaining stock. Other issues addressed related more directly to the employment relationship. A resident superintendent asked whether there would be any advantage in paying husbands and wives separately rather than as a team. Either Hammer or Reid undertook to look into this matter, from the perspective of taxes, OHIP, unemployment insurance and other benefits, and to report back to the employees as to which approach would be most advantageous to them. Grandy stated the main purpose of the meeting was to discuss “taking the work load off cleaners and superintendent”. One of the management representatives said the employer wanted to determine the capabilities of each employee and to place them in the jobs they could do best. Frank Hammer told them if they did their jobs right they would get

the first choice to work, and to live in the case of resident superintendents, in new buildings opened in the future. He told the employees they could go anywhere in the company and said he had started as a cleaner.

13. This meeting must be viewed in the context of a reorganization scheme introduced some six months earlier when the business came under new management. Mr. Blair testified changes have been introduced throughout this period. For example, work loads have been altered. The employer has also called superintendents to a meeting every two or three weeks to discuss their work and the proposed innovations. However, there has not been a meeting of all staff including maintenance workers and cleaners in the three months preceding the application.

14. Mr. Blair obtained a copy of Form 6 from Frank Hammer during the meeting on July 7. Shortly after the gathering ended, Blair approached Hammer and asked a question about the union. Mr. Hammer replied he couldn't talk about it. Blair then spoke to a few fellow employees about the certification application. That evening he went to Bob and Ann Grady's residence. Grady has twice appeared before the Nova Scotia Labour Relations Board in certification cases involving a group of employees who opposed the applications. He provided the wording for this petition and his wife wrote it:

“File #0656-83-R July 7, 1983

To the Ontario Labour Relations Board.

We the undersigned are opposing the application of union local #183. My signing of this petition is voluntary. To the best of my knowledge, Bramalea Ltd. does not know of this petition. Employer concerned Bramalea Ltd.”

15. Messrs. Blair and Grandy signed the petition that night. Grandy obtained signatures from two former employees on the morning of Saturday, July 9. Blair and Grandy devoted the morning of Friday, July 8 and the afternoon of Monday July 11 to the petition, and together they visited the rest of forty-one petitioners. All thirty-nine signed at the location of one of the employer's apartment buildings. Some resident superintendents were called upon at the doorway to their apartments. Blair visits these buildings in the course of his normal duties to deliver mail. The majority of the petitions were signed in the presence of at least one other petitioner and often several petitioners were present. The encounters between the two circulators and the petitioners were brief. Archie Blair and Bob Grandy said they thought a union was a bad thing, because the new management should have a chance to implement their plans without any complications. Each petitioner either read the document or, in the case of some who didn't have their glasses or couldn't understand a word, listened while it was read to them. The signatures of those who had signed earlier were visible. Grandy estimated that six petitioners, including the two former employees, contacted him to say they wanted to sign the petition. Blair stated “lots” of people took the initiative in this way.

16. Both Blair and Grandy were absent from work for approximately eight hours while circulating the petition. Archie Blair suggested Grandy might have worked in the evening to make up for this time off. Mr. Blair testified he asked Frank Hammer for permission to leave

work, on the pretence Blair was attending to his wife who recently had been in and out of hospital. According to Grandy, the employer was not aware he was not at work.

17. Counsel for the applicant did not contend Messrs. Blair and Grandy were acting in collaboration with management to defeat the certification application. Instead the Board was urged to consider the “cumulative impact” of all of the circumstances upon the volition of employees. Counsel argued that the distribution of Form 6 to employees at a meeting has a greater impact than posting this notice in the work place. He suggested the employer’s promises created a “sneaking suspicion in the back of the employees’ minds” that these improvements would not be implemented if the union was certified. Finally, we were reminded the petition was spawned shortly after the meeting on July 7th.

18. Counsel for the respondent argued the employer was merely complying with the Board’s instructions in distributing original copies of Form 6 to the resident superintendents for posting. He noted no charges had been filed against his client, and suggested there was no evidence which cast any doubt on the voluntariness of the petition.

19. The onus of demonstrating that a petition is voluntary rests upon those who present it: *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387. In the most blatant cases, the employer actively participates in the origination and circulation of the petition, but the Board is on guard against subtle variations on this theme. The perceptions of employees are as important as the actions and motives of management. A petition may be tainted by employer conduct which is reasonably perceived to be motivated by anti-union sentiment even though it is not: *Mitten Industries Galt Limited*, [1979] OLRB Rep. Mar. 154. Similarly, actions by petitioners which give rise to a reasonable perception of employer support may lead the Board to discount a petition: *Baltimore Aircoil Interamerican Corporation*, *supra*.

20. The petition was drafted and circulated shortly after the gathering on July 7th. That meeting was obviously on the minds of all of the employees who signed the petition. Standing alone, the distribution of Form 6 at the meeting is of little significance. In addition, we cannot find the employer told those present they must respond to the forms by the following Tuesday. However, the larger setting cannot be ignored. By handing out the forms the employer, intentionally or otherwise, drew a connection between the application for certification and the issues discussed at the meeting. Representatives of management made promises concerning new buildings and the payment of husband and wife teams. Employees were told of the opportunities for advancement by those who earned it. Intended or not, one effect of these statements was to remind employees that general terms and conditions of employment and individual progress lie within their employer’s control. This implicit message in juxtaposition to the application for certification would lead employees to suspect that their response to the union would influence their employment future. Although some of the topics discussed were part of an ongoing reorganization scheme, this was the first general staff meeting in at least three months, and employees would naturally conclude it was called in response to the application for certification.

21. The meeting was held during working hours and all employees received notice of it. No doubt they thought attendance was obligatory. Employees who think they are required to attend a meeting may readily conclude they are expected to adhere to the employer’s views stated there, either expressly or merely impliedly. See *Mitten Industries Galt Limited*, *supra*.

22. Archie Blair and Bob Grandy took time off work to circulate the petition. In view of the meeting of July 7th, some petitioners must have suspected that these two employees had been granted time off by their employer for this purpose. The wording of the preamble could not totally negate this perception.

23. All of the evidence leads to the conclusion that the petition is not a voluntary statement of the desires of the employees who signed it.

24. A certificate shall be issued to the applicant for the described bargaining unit.

1216-82-R Christian Labour Association of Canada, Applicant, v. Carroll Electric (1982) Limited and J. B. Carroll Electric Limited, Respondents

Practice and Procedure – Related Employer – Alternate applications for declaration of sale and related employer made – Board receiving evidence but not ruling on related employer application – On subsequent application Board relying on evidence received at prior hearing – Two companies arranging assets so as to avoid recovery by union for breach of the collective agreement – No delay – Anti-Union animus influencing Board discretion to make declaration – Attempt for “deep-pocket” relief in *Total Marketing* case distinguished

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members S. Cooke and L. Hemsworth.

APPEARANCES: *Owen V. Gray, Hank Beekhuis and Peter Van Duyvenvoorde for the applicant; R. F. Cline and J. B. Carroll on behalf of J. B. Carroll Ltd. and Patrick Carroll on behalf of Carroll Electric (1982) Ltd., respondents.*

DECISION OF THE BOARD; August 2, 1983

1. This matter arises pursuant to applications under sections 1(4) and 63 of the *Labour Relations Act*. By decision dated December 20, 1982, (now reported at [1982] OLRB Rep. Dec. 1814) the Board decided that the evidence before it allowed the Board to conclude that there had been a sale of a business pursuant to section 63(2). The Board concluded that it was unnecessary in the circumstances to make any findings in connection with the section 1(4) application. The Board indicated it would remain seized if there was any difficulty implementing its decision.

2. On May 26, 1983 the applicant wrote to the Board requesting three orders, namely:

(1) to consider and determine the applicant's application under section 1(4) for a declaration that the two respondents should be treated as constituting one employer for the purposes of the *Labour Relations Act* from and after September 20th, 1982.

(2) In connection with the foregoing, to order both respondents to adduce

evidence in accordance with the duty imposed by section 1(5) concerning all matters occurring up to the date of the hearing which are relevant to the issues raised by the applicant's application.

- (3) In connection with the foregoing, to rely on evidence heard in hearings herein November 1st, 1982 and to hear fresh evidence on matters which were discovered or occurred after that hearing. The nature of that evidence is described in the body of this letter.

The balance of this letter was devoted to setting out the facts and circumstances which caused the applicant to make these requests.

3. The Board convened a hearing on June 27, 1983, to consider the matters raised in the applicant's letter. At the outset of the hearing the Board, by unanimous ruling, announced to the parties the following:

- (1) During the original proceedings the application under section 1(4) was seen as an alternate if section 63 was not found; there was no argument that *both* ought to be applied.
- (2) There was sufficient evidence before the Board at the close of the original proceedings to conclude that section 1(4) could be applied.
- (3) The parties were therefore to address their evidence and argument as to why the Board ought to exercise its discretion and grant the section 1(4) application at this point in time.

4. The Board will not set out all of the evidence from the previous day's hearing because the repetition is unnecessary. There is no dispute that at the time of the Board's decision of December 20, 1982, there was a collective agreement between the applicant and J. B. Carroll Electric Limited (hereinafter "JBC") which was due to expire March 31, 1983. After the decision was released, grievances were lodged pursuant to section 124 of the Act by the applicant on January 12th, 13th and 14th (Board File No. 2161-82-M) wherein it was alleged that Carroll Electric (1982) Ltd. (hereinafter "Carroll Electric"), the company to whom the business of JBC was sold, was not observing the provisions of the collective agreement. Six hearing days were necessary for these grievances, the last of which was May 18, 1983. As of June 27, 1983, the date of our hearing, no decision had been rendered. In January of 1982, well prior to the expiration of the collective agreement, the applicant gave notice to bargain to both JBC and Carroll Electric. The first bargaining meeting was held March 29, 1983, whereat the applicant received a packet of proposed amendments (Exhibit 4) delivered by a Mr. Saunders, counsel for Carroll Electric and partner of Mr. R. F. Cline, counsel for JBC in the proceedings before us. Hank Beekhuis, the staff representative of the applicant, was the only witness to testify in detail about the bargaining. Patrick Carroll, owner of Carroll Electric, attended the Board's hearing but gave no evidence, and essentially allowed Mr. Cline to ask all necessary questions. We therefore take Mr. Beekhuis' evidence as being the undisputed description of the bargaining between the applicant and Carroll Electric. Mr. Beekhuis testified that when Exhibit 4 was delivered to the applicant on March 29, 1983, there was no indication by Mr. Saunders that there would be anything else by way of amendments to the collective agreement put forward by Carroll Electric. The next bargaining meeting was arranged

to be on April 11, 1983. Prior to this taking place, Carroll Electric applied for conciliation. The date on the application was March 29, 1983 but the applicant did not know of the application having been made until just before or on April 11, 1983. At the meeting of April 11, 1983, the applicant attempted to "see where [Carroll Electric] was going on money". The applicant indicated to Mr. Saunders that there was a possibility of some concession on the part of the applicant in view of the economic climate. By the time of the first conciliation meeting (and third meeting between the parties), Carroll Electric had prepared a new packet of amendments (Exhibit 5) it was seeking. These were substantially greater in content and extent than Exhibit 4. One notable addition was the deletion from the collective agreement of the "check-off" provisions wherein the employer agreed to deduct monthly from each employee's pay an amount equal to union dues and to forward such amounts to the union. When the applicant raised section 43 of the Act, which requires employers (other than those in the construction industry) to agree to check off amounts equivalent to union dues if the union requests this, Mr. Saunders responded that since Carroll Electric was in the construction industry, it was under no obligation pursuant to section 43. The question of whether Carroll Electric was in the construction industry had arisen in the context of the proceedings pursuant to section 124. In those proceedings which were progressing in tandem with bargaining, Carroll Electric's position was that some of its work was construction but some of it was "maintenance", and this combination would necessarily cause the "nullification" of the grievance under section 124 of the Act, since this section only pertains to construction industry grievances. At bargaining there was concern expressed by Carroll Electric regarding the applicant's use of section 124 proceedings, and the applicant gathered that if it promised not to use section 124 in future, the position of Carroll Electric regarding check-off would change. Mr. Beekhuis testified that Exhibit 5 was comprised of 3 parts - some proposals were identical to those in Exhibit 4, some came out of "discussion", and some the applicant had never seen or discussed before (e.g. deletion of the check-off provision). It appears that while notice to bargain was served on JBC, no negotiation between the applicant and JBC took place. Mr. Beekhuis indicated that he found it difficult to tell JBC apart from Carroll Electric.

5. The facts regarding shared premises and telephone system, as set out in our previous decision, have not changed. Apparently, Carroll Electric continues to lease virtually everything by way of office space, trucks and equipment from JBC. It also appears that whenever possible, Carroll Electric purchases its supplies from JBC. According to an agreement dated November 15, 1982 (Exhibit 8) between the two companies, Carroll Electric has agreed to pay approximately \$6,000 a month for all the lease/loan aspects of its relationship with JBC. The billings for purchases of supplies are separate. It is undisputed that Patrick Carroll, J. B. Carroll (owner of JBC), Joe Dulong, Bev. Long and Wayne Beard (all employees of Carroll Electric), alternately man the sales desk of J. B. Carroll. The trucks Carroll Electric rents from JBC still bear the "J. B. Carroll Electric Limited" logo, although J. B. Carroll explains that he is now primarily in the equipment rental business and the logo would be there for any other lessor too.

6. J. B. Carroll testified that JBC was now in the business of buying and selling transformers, selling electrical supplies, and leasing out vehicles and tools to contractors. JBC virtually stopped bidding on projects in March of 1983. While he indicated that in February of 1983 he was "desperate to get [his] vehicles going", he nevertheless did not advertise his rental service because "everyone knows". He claimed his desperation did, however, lead him to make a proposal in the following terms to the applicant:

I, J. B. Carroll called Hank [Beekhuis] on Monday February 21st and asked to meet with them. I explained a job that was out for tender and that I had an idea how to get his men back to work hoping it would ease the pain. Peter [Van Duyvenvoorde] called Tuesday and said he could meet me Wed. at 3 p.m.

At this meeting I proposed a plan to get some of the men back working with a fair wage for this area. Basic wage would be \$2.50 and [sic] hour more than any Company working here plus Workmen's Comp., O.H.I.P. and Vacation pay, and the possibility of a share the profit that I hoped would be \$2.00 per hour.

At this meeting before we ended up I stated that I hoped this would help in solving Carroll Electric 1982 Ltd. settlement with them. Peter said that regarding Carroll Electric settlement, the two factors mostly sought was Cash Settlement for Elwood, Earl and Terry and the seniority be implemented. Not definitely mentioned which company – they asked that whoever should go and borrow some dollars and they would like to get the matter cleaned up. Meeting adjourned and they indicated that they would have a meeting soon. I told them it was imperative that I know the results soon, as the job closed March 10th, 1983.

When asked to describe the connection between his offer to Hank and Peter and Carroll Electric's "settlement", he responded that he reasoned "if I got going, Pat would too". J. B. Carroll met, with the permission of the applicant, with 3 or 4 members of the applicant who were "doing all the screaming" behind the section 124 application. Earl and Terry were two of them. Mr. Carroll stated that Earl was screaming because he did not have a job with Carroll Electric. Mr. Carroll evaded answering whether by "cash settlement" he understood that this was the claim made against Carroll Electric because it did not hire certain employees from JBC. Mr. Carroll denied that his motivation in making this proposal to Hank and Peter was to get the applicant off his son's back. Mr. Carroll said he was simply desperate to get his vehicles going again. Notwithstanding his desperation, he did not take any business coming in on the two companies' common telephone line (more fully described in our previous decision) because "labour was too expensive". When asked whether his son's company could do it because his labour was cheaper, Mr. Carroll claimed to have nothing to do with his son's company. Mr. Carroll was shown a copy of his signature on an application under a Canada Employment Program called Canada Community Development Projects. The applicant's name and address was listed as Carroll Electric of 17 Bloomer St., Tillsonburg. J. B. Carroll (also described as being of 17 Bloomer St.) was listed as alternate contact at Carroll Electric. The date of application was September 27, 1982, and J. B. Carroll's signature appears at the base of the application with the position "Officer" alongside it. Mr. Carroll, in dealing with this document, again was evasive in his answers. He ultimately claimed that he never worked with his son on the project and was not doing so at all at the time the document was signed. Mr. Carroll could not remember, until he was shown the form of consent he executed allowing his son to use the Carroll name in his new company's name, that he had granted his son such a right. He also could not remember going to a lawyer's office with his son when the latter was incorporating Carroll Electric. Evidence of Pat Carroll from the previous day's hearing indicated his father did so. Mr. Carroll could not remember when the lease agreement between JBC and Carroll Electric (Exhibit 8) was actually concluded, and while prior to the agreement

there was pressure on JBC “to come up with something” because the total operating cost per month was \$10,000.00, he could not tell us when the first cheque from Carroll Electric came in. All in all, we concluded that Mr. Carroll was selective in his knowledge and recollection of events and that for this reason he was an unreliable witness. Therefore, wherever he offered explanations at variance with the inferences we would have drawn from the evidence, we have preferred our own inferences. These variations are most clearly highlighted in Exhibit 7. We read these minutes as representing a proposal by JBC which would directly assist Carroll Electric in resolving the section 124 proceedings against it. While Mr. Carroll professed to know nothing of Carroll Electric’s affairs, we cannot accept this, especially in light of Exhibit 7. We find Mr. Carroll and his son to be as closely linked in their business ventures in February of 1983 and currently as they were in September of 1982.

7. The applicant argued that we should exercise our discretion under section 1(4) because there has been a continuing refusal by Carroll Electric to abide by the collective agreement, as part of a continuing pattern of conduct by the Carrolls to rid themselves of the union. This is shown by the issues which were ultimately on the bargaining table, i.e., union security and grievance procedure, not wages. Any steps which the applicant could take by way of bad faith bargaining charges or section 124 applications would be futile because the two companies have arranged their affairs so that Carroll Electric is essentially a shell company. Section 1(4) is the best remedy in the circumstances because the real assets of Carroll Electric will be exposed.

8. The respondent, JBC, argued that section 1(4) is not a “curative section”. Grievances have been filed under the collective agreement and those grievances did not involve JBC. It was never a party and should not have an order impacting on it where it had no opportunity to make representations. The applicant could have brought its section 124 against JBC but did not. It should not be allowed to use section 1(4) to cure this procedural defect. The respondent also claimed that the applicant has delayed resurrecting its section 1(4) so long as to have deprived itself of its benefit. The letter of May 26, 1983 came 7 months after the release of the Board’s decision and some 8 months after the conclusion of the hearing. The respondent JBC argues that if the applicant is having problems negotiating with Carroll Electric or any other difficulties which may amount to a contravention of the Act, it should apply under section 89, not by way of section 1(4). Finally, the respondent argued it would be grossly unfair of the Board to continue this hearing on the basis of evidence already submitted.

9. The applicant in reply indicated that the only real argument against the imposition of section 1(4) at this stage is the impact it would have vis-a-vis the section 124 application. However, this is not sound because J. B. Carroll knew up until release of the Board’s decision that it was potentially exposed in any grievances and it could have protected its interests by encouraging Carroll Electric to conduct its affairs in accordance with the collective agreement. The section 124 proceedings were occasioned by Carroll Electric’s attempt to avoid the collective agreement. It was the original reason for the creation of Carroll Electric in September of 1982. The applicant questioned whether the formal presence of JBC at the section 124 proceedings would have changed them in any way. Also, having participated in creating Carroll Electric (in all the ways described in evidence from the previous days’ hearings), JBC cannot now complain it should have been at the section 124 proceedings. The prejudice the respondent JBC asserts is “prejudice in the air” because the respondent was unable to describe the exact nature of the prejudice. The prejudice never existed because JBC and Carroll Electric were always one company according to the tests under section 1(4). With respect to the delay,

the applicant claims it was simply giving the respondent Carroll Electric the benefit of the doubt, believing it was better to try to bargain a collective agreement and resolve differences without further litigation.

10. Section 1(4) provides:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

This section is different in emphasis from section 63 but their purposes are essentially the same, i.e., to preserve established bargaining rights and collective agreement(s). If the criteria for the application of section 63 are met, the Board has no discretion to refuse to make the declaration that a sale has occurred. The difference in section 1(4) is that the granting of an order pursuant to it is within the discretion of the Board (see *Radio Shack*, [1979] OLRB Rep. July 689). The question before us is whether this discretion ought to be exercised in the circumstances of the present case.

11. One of the factors which influences the Board's discretion is whether there has been anti-union animus (see *Acto Builders (Eastern) Limited*, [1972] OLRB Rep. June 465). To this extent section 1(4) is "curative". One of the factors which causes the Board to refuse to exercise its discretion under section 1(4) is proof that the applicant has unreasonably delayed in bringing its application (see *Farquhar Construction Ltd.*, [1978] OLRB Rep. Oct. 914; *Elwell & Sons*, [1978] OLRB Rep. June 535).

12. Having regard to all the evidence and the submissions of the parties, we have decided that our discretion ought to be exercised in favour of granting the declaration requested. We are convinced that the motives which we have found in our previous decision to have lain behind the creation of Carroll Electric have caused the two companies to arrange their affairs in such a way as to avoid fulfilling the obligations under the collective agreement. At the previous hearing, the respondent, Carroll Electric, had requested an adjournment of the proceedings because its development as a company "divorced" from JBC was only partially completed. Our sense at the time was that the "divorce" would be progressing beyond what existed as of the hearing in November. The only progress toward a further separation of the companies which we can detect is the signing of a lease agreement which simply puts a dollar valuation on the use of JBC's property by Carroll Electric. JBC appears to be primarily servicing and supporting Carroll Electric and we simply do not believe that JBC is in the "leasing business" as Mr. Carroll testified. JBC is a resource upon which Carroll Electric draws; we are not even convinced that payments pursuant to the lease agreement actually were made. Mr. Carroll gave strangely inconsistent evidence on this subject. On the one hand he described his situation as being desperate in that he had monthly operating expenses of \$10,000, but on the other hand he could not remember the delivery of his son's first cheque pursuant to the leasing agreement. JBC was also used as a resource by which Carroll Electric could settle

with the grievors in the section 124 grievance without Carroll Electric itself having to acknowledge liability. This was the goal behind Mr. Carroll's proposal of February 24, 1983 (Exhibit 7). The continuing ongoing close linkage between these two companies was acknowledged by Mr. Carroll himself when he indicated that his motivation in proposing the arrangement as set out in Exhibit 7 was that "if I got going, Pat would too". This shows that the two companies continue to be interrelated but are attempting to assert, when convenient, a distance which is not there in order to defeat the bargaining rights of the applicant. The attitude of Carroll Electric in its bargaining shows that it continues to steer a course which might result in it succeeding in the elimination of a bargaining relationship with the applicant. For all these reasons we have concluded that the two respondents have arranged their affairs so that any liability which Carroll Electric incurs in its alleged avoidance of its collective agreement responsibilities will be unrecoverable because it is essentially, through special arrangements with JBC, an assetless company.

13. While it is true that section 1(4) is not a means for a bargaining agent to obtain deep-pocket relief (see *Total Marketing Incorporated*, [1983] OLRB Rep. Apr. 616, the facts of this case are vastly dissimilar from those in *Total Marketing*. In that case the only rationale for the filing of the section 1(4) application was to create a means to attach the assets of the parent of the company which had no bargaining relationship with the union. The parent appears never to have had a direct employer/employee relationship with the employees in the bargaining unit and there was no scheme between the two companies to avoid liability for any failure to fulfill collective bargaining responsibilities. The subsidiary was insolvent at the time of the arbitration award in which the union had been awarded damages and the union was simply trying to use section 1(4) to overcome the effect the bankruptcy had on its recovery of the awarded damages. Those were clearly different circumstances from those created by JBC and Carroll Electric in the instant case. We have determined that at all material times there has been, and continues to be, a scheme of avoidance of collective bargaining duties and responsibilities which even extends to intentionally creating and maintaining a leasing arrangement which allows Carroll Electric to be virtually without assets against which the union could move.

14. For all these reasons we have determined that our discretion ought to be exercised in favour of declaring that JBC and Carroll Electric are associated or related companies within the meaning of section 1(4). We do not consider that JBC has been prejudiced in this declaration being made at this time. Except in unusual cases where the Board considers it appropriate to expressly limit the normal operation of a section 1(4) declaration, such declaration is effective as of the date the employer commenced operating the related business (see *Norfolk Hospital Association*, 77 CLLC ¶14,094 (Div. Ct.), and *Roy Brandon Construction*, [1981] OLRB Rep. Feb. 219). We also do not think that the applicant has been guilty of sleeping on its rights. Prompt application was made in September and the applicant cannot be faulted for having the confidence, after the Board's decision of December 20, 1982, that the situation between itself and the respondents would be thereby rectified. The Board had the similar confidence in issuing a decision which only dealt with part of what the applicant requested. It appears that there is need for a section 1(4) declaration after all and, under the circumstances, we find it appropriate to grant it. Accordingly, the Board hereby declares that the respondents, Carroll Electric (1982) Limited and J. B. Carroll Electric Limited are, and have been since the inception of Carroll Electric (1982) Limited, one employer for the purposes of the *Labour Relations Act*.

2161-82-M Christian Labour Association of Canada, Applicant, v. Carroll Electric (1982) Limited, Respondent, v. Derek Murr, Employee

Construction Industry – Construction Industry Grievances – Damages – Practice and Procedure – Sale of a Business – Whether insufficient particulars or inadequate notice to affect employees depriving Board of jurisdiction – Whether Board having jurisdiction over grievances relating non-construction part of work – Whether employees failed to mitigate damages by not applying for employment with successor employer – successor’s liability not restricted to period after issuance of Board’s sale declaration

BEFORE: R. D. Howe, Vice-Chairman, and Board Members I. M. Stamp and E. G. Theobald.

APPEARANCES: *Owen V. Gray and Hank Beekhuis for the applicant; Richard Nixon, Frank Sanders, Pat Carroll and Suzanne Holland for the respondent; Derek Murr appearing on his own behalf.*

DECISION OF THE BOARD; August 17, 1983

1. This is a referral of certain grievances to the Board under section 124 of the *Labour Relations Act*. Two of the grievances are dated January 11, 1983 and the third is dated January 13, 1983. The grievances, as further particularized by counsel for the applicant in an eight paged document dated March 23, 1983, claim union dues, wages, vacation pay, medical plan benefits, tool allowance, holiday pay, and compensation for various other losses resulting from the respondent’s alleged collective agreement breaches from September 20, 1982 to March 31, 1983.

• • • •

3. In his preliminary submissions to the Board on March 25, 1982 (following abortive settlement discussions), counsel for the respondent contended that the Board was “without jurisdiction to deal with all three grievances referred to the Board simultaneously”. He also submitted that certain employees who might be adversely affected by the Board’s decision had not received adequate notice of the hearing, that particulars of the grievances had not been supplied sufficiently far in advance of the hearing, and that the Board did not have jurisdiction to hear the grievances to the extent that they related to employees not working in the construction industry. After considering those submissions, the Board made the following oral ruling, which is hereby confirmed:

“Having considered the submissions of counsel for the respondent and having offered the individual employee who has entered an appearance an opportunity to make submissions to the Board concerning the preliminary matters raised by counsel for the respondent, we are of the view that it is unnecessary to hear submissions from counsel for the applicant con-

cerning the four preliminary matters raised by the respondent. The issue of whether the persons whom the respondent asserts to be 'affected employees' have received notice of these proceedings sufficiently in advance of the hearing date is academic in view of the fact that the Board will not in any event embark upon a hearing of the merits of these grievances today in view of the lateness of the hour. There can be no doubt that those persons will have had adequate notice by April 12th and 13th when the hearing of this matter is scheduled to continue. Similarly, the issue of whether the particulars of the grievances were supplied sufficiently in advance of the hearing, and whether particulars needed to be supplied in any event, is also academic in the view of the fact that we will not proceed with the merits until April 12th. We would note, however, that if counsel for the respondent disputes the adequacy of the particulars that have been supplied, it will be incumbent upon him to notify the applicant of any alleged inadequacies forthwith.

With respect to the matter of the Board's jurisdiction to deal with these three grievances together, we are of the view that the Board, as master of its own procedure, should, as a matter of labour relations policy, hear all of these grievances together in order to deal with the matters in dispute between the parties in a single proceeding. In reaching that decision, we have considered the obvious interrelatedness of the subject matter of the grievances. With respect to the fourth point, the respondent does not dispute that the Board has jurisdiction to hear these grievances at least in so far as they relate to the construction industry. As part of its case on the merits, it will be incumbent upon the applicant to satisfy the Board that the relief which it requests falls within the Board's jurisdiction. However, we are of the view that evidence concerning that matter can best be heard together with the other evidence which the applicant will adduce in support of its case. Therefore, this matter is recessed until April 12th and 13th when we shall hear the matter on its merits."

4. The evidence adduced before the Board in this matter included twenty-seven exhibits and the testimony of ten witnesses. There were a number of conflicts in that evidence, many of which merely reflect the natural weakening of memory with the passage of time, and the tendency of witnesses to recall events in the light most favourable to their present concerns, rather than a conscious attempt to mislead the Board. In making our findings of fact in this matter, the Board has considered a number of factors including the firmness of the witnesses' respective memories, their ability to resist the influence of interest to modify their recollections, their consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. We have also assessed what is most probable in the circumstances of this case, and what inferences may reasonably be drawn from the totality of the evidence.

5. The applicant has had a collective bargaining relationship for a number of years with J. B. Carroll Electric Limited ("JBC"), an electrical contractor in the construction industry, which also performed some service and maintenance work. The most recent collective agreement (the "collective agreement") between those parties was signed in April of 1981 for a two year term, from April 1, 1981 to March 31, 1983.

6. On September 9, 1982, J. B. Carroll, the President of JBC, caused the following written notice (Exhibit 4) to be given to bargaining unit employees:

"To J. B. Carroll Electric Limited Employees:

Dear Employee:

Due to trending economic pressures and lack of sufficient work, I am serving this notice that *all* employees of J. B. Carroll Electric Ltd. covered under the bargaining unit of the C.L.A.C. will be laid off effective Friday, September 17, 1982.

This notice is given pursuant [sic] to Article 11.04 of the collective agreement."

That notice was distributed to employees by E. Patrick Carroll ("Pat Carroll"), J. B. Carroll's son, at a meeting held on September 9, 1982 at the request of J. B. Carroll. Pat Carroll had been employed by JBC for a number of years in various capacities; he had worked as a licensed electrician and had also exercised various managerial responsibilities. His involvement with the firm was reduced while he attended university, but was restored after he obtained an engineering degree and returned to JBC where he was known as "Vice-President" (although he testified that there were "no legal documents" giving him that position). At that meeting, Pat Carroll told employees that he had "formed a new, non-union company in order to be more competitive in the immediate area and to try to get some contracts". He informed the employees that his new company would pay \$10.50 per hour for a licensed journeyman electrician (\$2.00 per hour less than the wage rate specified in the collective agreement.) Apprentices' wage rates were also to be calculated on the basis of that reduced wage rate (by applying the appropriate percentage). He added that there would be "no benefits except for O.H.I.P" since the collective agreement would no longer apply. He also advised the employees that his father would be "winding down his operation" and "trying to sell off his inventory". Pat Carroll told employees that they were all welcome to apply for a job with the new company, but cautioned them that he "couldn't promise them too much work" because he "had no work to start from". He also stated that he would be holding job interviews the following week. When one of the men asked if that would mean that the men might be working for the new company one week at non-union rates and for JBC the next week at union rates, Mr. Carroll responded in the affirmative. The "new company" to which Pat Carroll referred was the respondent, Carroll Electric (1982) Limited.

7. On or about September 13, 1982, Pat Carroll, as President of the respondent, posted in a conspicuous location on JBC's premises, the following notice to bargaining unit employees:

"Job applications will be available from Mrs. Shirley Barker today. Please complete the forms and return them to her. You will be notified and personal interviews will be arranged on one of the following dates, September 15, 16, or 17th, 1982."

8. On September 15, 1982, Pat Carroll met with Earl Prouse, a bargaining unit employee who had spent a number of months preparing himself for "high voltage" work (testing

high voltage transformers, lines, and switch gear). After explaining to him that there did not appear to be enough "high voltage" testing work to occupy all of his time, Mr. Carroll asked him if he would consider "going back into the trade" to work as a journeyman. He also asked him to consider purchasing the "high voltage" equipment from JBC so that the respondent could subcontract that work to him. When Pat Carroll had not heard back from Mr. Prouse by September 23, he proceeded to hire Wayne Beard, an individual who had not previously worked for the respondent or for JBC, but who had "high voltage sales, service, and maintenance experience" with another (unrelated) company. Mr. Prouse testified that he did not contact Pat Carroll following that meeting because he "just figured it was all over there". It is also evident that he was not prepared to work for the respondent on the basis of the reduced wage rates and benefits which Pat Carroll was offering.

9. The grievor Elwood Chapman was not in attendance at the September 9th meeting as he was away from work at that time due to medical problems. However, a copy of Exhibit 4 was sent to him and he was laid off, effective September 17, 1982, along with grievors Beverley Long, Earl Prouse, Terry Smith, Milt Smith, Gerald Smith, and Derek Murr, whose respective seniority dates ranged from April 14, 1954 to September 30, 1964. Also laid off at that time was Terry Pottelberg, an apprentice whose seniority date was April 27, 1981. A number of other employees, including the grievors Dale Wooley (whose seniority date was June 1, 1969), Dan Murray (whose seniority date was June 12, 1970), and Jim Gable (whose seniority date was October 10, 1972) had been laid off by JBC prior to September due to lack of work.

10. Beverley Long, Gerald Smith, Derek Murr and apprentice Terry Pottelberg commenced to work for the respondent in late September of 1982, after filling out applications for employment and being interviewed by Pat Carroll. However, Terry Smith, Milt Smith, Dale Woolley and Dan Murray did not complete applications or seek interviews with Pat Carroll concerning employment by the respondent. Jim Gable also applied for a position with the respondent but was not hired until November of 1982 when the respondent obtained government funding for a Canada Community Development Project, involving the development and installation of a new electrical heating system at a church. Mr. Gable was one of the four persons hired by the respondent to work on that project. Although Mr. Gable was technically ineligible to work on the project because he was "on welfare" rather than unemployment insurance, Pat Carroll persuaded Employment and Immigration Canada to "make an exception" in his case and also in the case of apprentice Ed Hill (whose seniority date was August 3, 1978), who was another of the four persons employed on that project. In addition to that project, in the period covered by the grievances the respondent also performed other construction work, and some electrical service and maintenance work. The persons employed by the respondent to perform bargaining unit work during that period were Beverley Long (who was first on the seniority list), Gerald Smith (who was sixth on the seniority list), Derek Murr (who was seventh on the seniority list), Jim Gable (who was eleventh on the seniority list), Wayne Beard (who was not on the seniority list since he had never worked for JBC and was not, in any event, a bargaining unit employee), apprentice Ed Hill (who was thirteenth on the seniority list), apprentice Terry Pottelberg (who was fourteenth on the seniority list), and apprentice Gary Shackleton (who was also not on the seniority list as he had never worked for JBC). Pat Carroll also performed some bargaining unit work during that period.

11. On September 29, 1982, the applicant filed with the Board an application under section 63 of the *Labour Relations Act* (File No. 1216-82-R) in which it alleged that as a

result of a sale of a business by JBC to the respondent on or about September 20, 1982, the respondent was bound by the collective agreement. In that application the applicant also requested the Board to apply section 1(4) of the Act.

12. By letter dated September 30, 1982, counsel for the applicant wrote to the respondent (to the attention of Pat Carroll) as follows:

“We act for the Christian Labour Association of Canada.

The Ontario Labour Relations Board will have served you with our client’s application under Section 63 of the Labour Relations Act for a declaration that your company is bound by the terms of CLAC’s Collective Agreement with J. B. Carroll Electric Limited.

If you consult solicitors with some expertise in this area, I am quite sure they will advise you that you are covered by the provisions of Section 63 of the Ontario Labour Relations Act. They will also advise you that Sections 1(5) and 63(13) of the Ontario Labour Relations Act require that you give evidence at the hearing of CLAC’s application and disclose all facts material to the allegations made therein. Those facts would include the identities of the directors and officers of both Respondent companies, the names of the shareholders of each company and the number of shares held by each, all financial arrangements between the shareholders and the companies and between the companies themselves, all bids and contracts made by and awarded to each of these coSolicitors with expertise in this area will undoubtedly advise you that you were required to pay the wage at least, your arrangements with your various creditors and so on. This list is not intended to be exhaustive, but merely to make it clear to you that you will be obliged to expose for scrutiny every aspect of the business of Carroll Electric.

Solicitors with expertise in this area will undoubtedly advise you that you were required to pay the wage rates set out in the aforementioned Collective Agreement from the moment you took on any electricians or electricians’ apprentices. Our client is advised that you have not been paying the wage rates set out in that agreement.

I suggest you have your solicitors contact me immediately to discuss this matter. If I do not hear from you or your solicitors within one week of the date of this letter, the necessary steps will be taken under the Grievance Procedure of the Collective Agreement, leading to a referral to arbitration before the Ontario Labour Relations Board under Section 124 of the Labour Relations Act.

Kindly govern yourself accordingly.”

13. The trade union’s application under sections 63 and 1(4) of the Act was heard by another panel of the Board on November 1, 1982. In a decision dated December 20, 1983 (reported in [1982] OLRB Rep. Dec. 1814), that panel concluded that a “sale of a business

within the ambit of section 63(1)(b) of the Act’’ had taken place and so declared. In reaching that conclusion, the Board noted that anti-union animus formed part of the motivation for the transaction:

“15. It has been said that while no anti-union animus must be proved to succeed under either section 1(4) or section 63, it is nevertheless, a relevant consideration (see *Grand Valley Ready Mix*, [1981] OLRB Rep. June 663; *Moore Groceteria Limited*, [1980] OLRB rep. April 486.) In this instance it is clear that an important reason why Mr. P. Carroll wished to incorporate his company was in order to avoid the collective bargaining obligations under which J. B. Carroll Electric operated. He testified that if he were to remain in the Tillsonburg area and do contracting and high voltage work, he would have to have competitive wages. Since his competitors were non-union, he needed to be non-union. Two years before, J. B. Carroll Electric employees in this bargaining unit had been asked to make wage concessions to be more competitive, but this had been rejected. In light of this the only route to competitiveness was through a non-union work force. Section 63 was enacted to block this very type of avoidance. While the context of a collective agreement always has an impact on competitiveness, any negative impact must be resolved in the normal course of collective bargaining, not through avoidance thereof. This is not a situation where a company is formed to compete with another. The formation of his own company meant that Mr. P. Carroll was not ‘leaving’ his father. In his own testimony he chose not to leave him because if he did, it would have been hard for him to get started. After all, J. B. Carroll Electric was a going concern with customers, ‘goodwill’, inventory and the kind of equipment best suited to the high voltage work Carroll Electric wished to increase. Therefore, it is the Board’s conclusion that incorporation of Carroll Electric was intended in part to avoid one of the two significant liabilities J. B. Carroll Electric had – a collective bargaining relationship.”

That decision was received by the respondent on January 6, 1983.

14. The evidence before the Board establishes that although most of the work to which the grievances pertain is work within the “construction industry” (as defined in section 1(1)(f) of the Act), some of it is non-construction work, such as service and maintenance of electrical equipment. Counsel for the respondent contends that the Board has no jurisdiction under section 124 of the Act to consider those portions of the grievances which pertain to matters outside the construction industry. Counsel for the applicant, on the other hand, submits that the Board has jurisdiction under section 124 of the Act to consider and award relief in respect of all aspects of the grievances since the applicant is a “trade union” within the meaning of section 117(f), and the respondent is an employer within the meaning of section 117(c). In the alternative, he submits that the Board has jurisdiction in these proceedings to grant relief under section 89 of the Act in respect of the respondent’s breaches of the collective agreement.

15. In *M. G. Burke Investments Ltd.*, [1978] OLRB Rep. April 348, the employer acknowledged that it was bound by a collective agreement with the union in respect of its con-

struction work, but denied that the collective agreement also covered non-construction work. Through the grievance referred to the Board in that case, the union sought to recover the differential between the collective agreement rate and the rate which the company had paid with respect to its non-construction work. At the hearing, the union also challenged the employer's contention that it had paid the collective agreement rate for all its construction work. After noting that section 124 (then section 112a) "is not of general application but is restricted only to the construction industry", the Board ruled that it lacked jurisdiction to "act as an arbitration board with respect to matters arising outside the scope of the construction industry". Counsel for the respondent also relies upon *London Sandblasting & Painting Limited*, [1982] OLRB Rep. Sept. 1322, in support of his contention that the Board's jurisdiction under section 124 is limited to the respondent's work in the construction industry. However, in that case the parties agreed that the Board could not concern itself with grievances insofar as they relate to non-construction work, and further agreed that "if one or more ['private' arbitration] boards are established, it or they should deal with all aspects of the grievances, both construction and non-construction, notwithstanding the two section 124 referrals". Thus, it was unnecessary for the Board to rule on the extent of its jurisdiction under section 124 in that case.

16. Section 124 provides as follows:

"124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsections 4(6), (8), (9), (10), (11) and (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

(4) The expense of proceedings under this section, in the amount fixed by the regulations, shall be jointly paid by the parties to the Board for payment into the Consolidated Revenue Fund."

Under that provision only "a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions" may refer a grievance to

the Board for final and binding determination. By virtue of section 117, for the purposes of section 124 “‘employer’ means a person who operates a business in the construction industry” (as defined in section 1(1)(f) of the Act) and “‘trade union’ means a trade union that according to established trade union practice pertains to the construction industry.” It is common ground between the parties that the applicant is a “trade union” within the meaning of section 117(f). The parties are also in agreement that the respondent “operates a business in the construction industry”, although counsel for the respondent contends that the respondent also operates a business outside the construction industry. However, as noted by counsel for the respondent, the section 117(c) definition of employer is not limited to persons who operate a business *exclusively* in the construction industry. Moreover, all of the grievors in the present case are “employees” within the meaning of section 117(b) of the Act since all of them who are not engaged exclusively in on-site work are commonly associated in their work or bargaining with on-site employees. It is true, as submitted on behalf of the respondent, that the applicant could have referred its grievances to arbitration under the arbitration clause contained in the collective agreement (Article 20). However, that would have meant that these grievances, which primarily relate to construction work, would have been subjected to arbitration procedures of a type which have generally been recognized to be ill-suited to the needs of the construction industry (see, for example, *The Lummus Company Canada Limited*, [1976] OLRB Rep. Jan. 980). It is also true that the applicant could have availed itself of the expedited arbitration procedure provided by section 45 of the Act. However, since the majority of the work to which the present grievances relate is clearly within the construction industry, and since the grievances have unfair labour practice overtones, arising as they do from the respondent’s continuing refusal to recognize the binding effect of the collective agreement upon it despite the Board’s aforementioned declaration, it was not at all unreasonable for the applicant to refer these grievances to the Board under section 124 rather than requesting the Minister to refer them to a single arbitrator pursuant to section 45 of the Act. Moreover, it is also not without significance that the respondent made no objection to the Board’s jurisdiction under section 124 until the time limit set forth in section 45(2) of the Act had expired. (Article 20.02 of the collective agreement stipulates a fourteen day time limit for referring a grievance to arbitration).

17. Under the circumstances, the Board is satisfied that it has jurisdiction to hear all aspects of these grievances under section 124 of the Act. Furthermore, if section 124 gives us jurisdiction to hear the grievances only predecessor’s collective agreement “as if he had been a party thereto”. Thus, the respondent’s failure to honour it with the non-construction aspects of these grievances under section 89 of the Act, and that in the circumstances of the present case we should exercise our discretion to do so. Section 50 of the Act provides that a collective agreement is binding upon the employer and upon the trade union that is a party to the agreement. Moreover, as noted above, section 63(2) provides that, until the Board otherwise declares, a successor employer is bound by his predecessor’s collective agreement “as if he had been a party thereto”. Thus, the respondent’s failure to honour the collective agreement is a contravention of sections 50 and 63(2) of the Act, which can be enforced under section 89 of the Act in the context of the present proceedings. See, *Genaire Ltd.*, 58 CLLC ¶15,388 (O.H.C.), *aff’d.* 59 CLLC ¶15,416 (Ont. C.A.), in which McRuer C.J.H.C. indicated that the procedure before the Board ought not to be so formal as to deny an applicant relief because of some technical formality in the framing of an application, and further indicated that the Board “should exercise any jurisdiction given to it under the Act notwithstanding that a particular section of the Act is referred to in the formal application”, where, in substance, the application can be considered an application to the Board to exercise its ju-

risdiction. See also *J. G. Rivard Limited*, [1980] OLRB Rep. July 1009, and *Eastern Sheet Metal and Mechanical Construction*, [1981] OLRB Rep. Jan. 26, in which the Board followed the court's directions to construe liberally the substantive and remedial bases to the matters before it, by granting relief under section 89 of the Act in section 124 proceedings, even though the applicant had not "pleaded" section 89. See also *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418.

18. For the foregoing reasons, the Board concludes that it has jurisdiction to deal with all aspects of the grievances which have been referred to us in the present proceedings.

[Review of grievances omitted]

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25. Counsel for the respondent contended that the JBC employees who did not apply for employment with the respondent are not entitled to any compensation since they failed to mitigate their loss by accepting the "offer of employment" extended by Pat Carroll on behalf of the respondent, failed to observe the "comply now, grieve later principle" by accepting employment with the respondent, or "quit" in that they failed to accept recall by the respondent. Counsel for the respondent conceded that the events cannot be "easily pigeon-holed" into any of those three categories. However, the essence of his submission is that the employees should have availed themselves of the opportunity to apply for employment with the respondent. Having regard to all the evidence, we find that the JBC employees who did not apply for employment with the respondent declined to do so because of a concern that by accepting a position with the new company at a lower rate of pay and without other benefits (except O.H.I.P.) provided by the collective agreement, they might prejudice their right to recover their losses and might also undermine the applicant's position. Moreover, many, if not all of them, felt that there was no need to apply for a job since they already had jobs with the firm. For example, when Milt Smith was asked in cross-examination if he had ever seen "any kind of posting by Pat Carroll that job applications were available", he replied, "Yeah, I saw that posting but I already had a job through the union with this firm so why would I go for another one?" He also indicated that he would have been willing to "accept work for Pat Carroll under the same conditions [he] was working at [before being laid off by JBC]". Similarly, when Earl Prouse was asked (in cross-examination) why he did not apply for employment with the respondent, he replied, "I felt that it was all one with the same company, and we already had a contract."

26. In *Wilco Canada Inc.*, [1983] OLRB Rep. June 989, the Board, in the context of unfair labour practice discharges, reviewed in depth the common law, labour board, and arbitral jurisprudence concerning the issue of whether the mitigation duty requires a discharged employee to accept an offer of reinstatement by the employer who discharged him. The Board held that an employee who rejects a bona fide offer of reinstatement is not entitled to receive compensation for the period following the date at which acceptance at that offer would have resulted in re-employment. However, the Board also stated (at paragraph 33):

".... To be effective to relieve an employer from further liability, an offer to reinstate an illegally discharged employee should generally be on the same terms as those enjoyed by the individual prior to discharge. Any

adverse modification in terms and conditions of employment may provide an indication that the reinstatement offer was not made in good faith”

Having carefully considered the pertinent jurisprudence as set forth in that decision, we are of the view that the grievors were not obliged to apply for employment with the respondent in the present case. The circumstances of this case, when viewed as a whole, clearly indicate that the creation of the respondent, complete with employment applications and interviews by Pat Carroll of individuals whom he had known in the context of his father’s work place for many years, was an transparent device adopted for the express purpose of jettisoning the collective agreement and the applicant’s bargaining rights. Employees cannot be faulted for being unwilling to lend an element of credibility to a charade of that sort by filling out employment applications and attending employment interviews concerning positions to which they (quite correctly) view themselves to be legally entitled in any event. Moreover, it is important to note that Pat Carroll was not specifically offering them employment, but rather was merely offering them an opportunity to apply for possible employment on a sporadic basis with a new “non-union” company under substantially poorer terms and conditions of employment than those to which their collective agreement entitled them. Thus, we are of the view that the grievors did not fail to observe the “comply now, grieve later” principle which has application in some instances where a grievor is given an order or direction, did not “quit” their employment, and did not fail to mitigate their loss by applying for employment with the respondent in the circumstances of this case.

27. Furthermore, on the basis of all the evidence before us, including the evidence concerning the efforts made by various grievors to find alternate employment by registering with Canada Manpower and approaching other employers, we find that there is no merit in the respondent’s contention that the grievors have failed to properly mitigate their respective losses. (See, generally, *Sutton Place Hotel*, [1980] OLRB Rep. Aug. 1250).

28. We are, however, satisfied that Elwood Chapman, who was away from work recovering from an operation at the time of the “lay-off” on September 17, 1982, is entitled compensation only from December 12, 1982, which we find to be the date as of which he should have been recalled. Although he testified that his surgeon told him that he would be able to go back to work on October 4, 1982, he took no steps to communicate that information to JBC or the respondent until early December of 1982.

29. Counsel for the respondent contends (as an alternative to other arguments which, if accepted, would further restrict or eliminate his client’s liability) that the respondent’s liability for contravention of the collective agreement should run only from January 6, 1983, the date on which the respondent received the Board’s decision (in File No. 1216-82-R) concerning the aforementioned application under sections 63 and 1(4). However, section 63(2) provides that “[w]here an employer who is bound by or is a party to a collective agreement sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto” Thus, by virtue of that provision, the respondent was bound by the collective agreement from the moment that the sale of business took place. The legal effect of section 63(2) was described by the Board as follows in *Emrick Plastics Inc.*, [1982] OLRB Rep. June 861:

“18. We conclude, similar to the British Columbia Labour Relations Board, that section 63(2) of our own Act continues the effect of a col-

lective agreement over a sale transaction *without hiatus*, and that the purchaser stands literally in the shoes of its predecessor with respect to any rights or obligations under that agreement. The purchaser, in other words is given no opportunity to 'weed out undesirable employees' contrary to the provisions of the collective agreement, nor to decline to recognize any of the seniority or other rights accrued by employees under the collective agreement during their tenure with the predecessor employer. We agree with counsel for the respondent that the purchaser takes the business *exactly* as he receives it from the vendor. Even if, for example, employees have been given notice of termination by the vendor, the purchaser is no more entitled to start that business up without regard to the recall rights of employees under the collective agreement than the vendor would have been. The obligations of neither employer are determined by whether the employer on its own chose to treat a severance at a given point in time as a termination or a lay-off."

Thus, we reject the respondent's contention that liability should not predate receipt of the Board's decision. The respondent had retained experienced counsel in advance of the hearing of that matter and it is reasonable to infer that the respondent had been fully and properly advised concerning its potential exposure to liability. In any event, ignorance of the law provides no excuse for the respondent's actions and does not reduce its liability for breaches of the collective agreement by which it was legally bound from the time of the sale.

30. We are also satisfied that there is no merit in the submission of counsel for the respondent that his client's liability should not predate by any more than five work days, the filing of the grievances which form the subject matter of these proceedings. Within days after the sale, the applicant not only filed the aforementioned application under sections 63 and 1(4) of the Act, but also caused its counsel to write to the President of the respondent advising him of that application and of the applicant's intention to enforce its rights under the collective agreement. While that letter emphasized the respondent's obligation to pay the wage rates set out in the collective agreement, it also indicated, at a more general level, that the applicant was of the view that the respondent was bound by the terms of the collective agreement, and that the applicant intended to assert (before the Board) its rights under that agreement. The applicant's continued intention to enforce those rights was evident from its pursuit of its application under sections 63 and 1(4). When it became apparent to the applicant that the respondent was continuing to flaunt its obligations under the collective agreement notwithstanding the Board's decision of December 20, 1982, it promptly filed the grievances which are presently before us. The five work day time limit for filing grievances, specified in Article 19.02, is inapplicable to the present grievances since Article 19.02 provides that the limitation period in question "shall not apply to differences arising between the parties [thereto] relating to interpretation, application or administration of this Agreement." Moreover, even it were to be assumed that the five work day period applies to the instant grievances, and that it is a mandatory (as opposed to directory) time limit, having regard to all the circumstances, we are satisfied that this is an eminently appropriate case in which to extend the time for filing the grievances, pursuant to section 44(6) of the Act, as we are empowered to do by section 124(3).

31. Pat Carroll testified that much of the work which the respondent performed during the period covered by these grievances, was obtained by bidding at "non-union rates", and would not have been obtained if it had been bid at "union rates". However, his evidence in

this regard was strictly hearsay, and there is no cogent direct evidence which supports that assertion. Moreover, as a matter of labour relations policy, it simply does not lie in the mouth of a party which has unabashedly breached its obligations under a collective agreement binding upon it, to attempt to escape liability for such breaches by asserting that since it only obtained the work in question by disregarding its collective agreement obligations, the trade union and its members cannot claim any loss in respect of that work. If such a defence were available, any employer could proceed to ignore with impunity its wage rate and other collective agreement obligations. Such an approach is utterly inconsistent with the provisions, spirit, and intent of the *Labour Relations Act* and, in particular, with sections 50 and 63(2), as described earlier in this decision. Similarly, the respondent cannot raise the Canada Community Development Project employee eligibility requirements as a shelter from liability for violations of the collective agreement, particularly where, as in the present case, persons ostensibly employed on such project forty hours per week were in fact working far fewer hours on that project as they were being concurrently assigned by the respondent to perform other bargaining unit work.

[Portion of decision assessing quantum of damages omitted]

0179-83-R; 0178-83-R International Union, United Automobile Aerospace Agricultural Implement Workers of America and its Local 27, Applicant, v. Central Chev. Olds. Inc., and 533556 Ontario Inc., carrying on business as the **Complete Car Care Centre**, Respondents, v. Pat-Har Holdings Ltd., Intervener

Related Employer – Sale of a Business – Whether sub-contracting of washing and rust-proofing work constituting sale of part of business – Transfer of work alone not constituting sale – No common ownership or management – Not related employers

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: *L. A. MacLean and Peter Kennedy for the applicant; Julius Melnitzer, Russell Raikes, Harry McCoy and Scott Fallis for Central Chev. Olds. Inc. and Pat-Har Holdings Ltd.; John Foster and Veronica Esbaugh for Extend-A-Life Car Care Centre and 533556 Ontario Inc., carrying on business as the Complete Car Care Centre.*

DECISION OF THE BOARD; August 31, 1983

1. The names of certain of the respondents appearing in the style of cause of these applications are amended to read: “Central Chev. Olds. Inc.”, “Pat-Har Holdings Ltd.” and “Extend-A-Life Car Care Centre”. “533556 Ontario Inc., carrying on business as the Complete Car Care Centre” is hereby added as a party respondent in both files.

2. File No. 0178-83-R is an application under section 1(4) of the *Labour Relations Act*. This section empowers the Board in certain instances to treat as a single employer two

or more business entities that are being carried on under common direction or control. File No. 0179-83-R is an application under section 63 of the Act. Section 63 provides that where an employer bound by a collective agreement sells his business, or part of his business, the purchaser of the business is bound by the terms of the collective agreement. The section also empowers the Board to decide whether or not a business has been sold.

3. In July of 1981, Central Chevrolet Oldsmobile (London) Limited, the largest General Motors dealership in the City of London, was sold to Central Chev. Olds. Inc. ("Central Chev. Olds."), a company wholly owned by Pat-Har Holdings Ltd. Pat-Har Holdings Ltd. is, in turn, owned by Mr. and Mrs. H. McCoy. Mr. McCoy, who has been active in the automotive dealership business for some twenty-five years, is responsible for the overall operations of Central Chev. Olds. The actual day-to-day activities of the company are carried on under the direction of a number of departmental managers. Central Chev. Olds. is currently bound to a collective agreement with the applicant trade union.

4. Prior to the events giving rise to these proceedings, the service department of Central Chev. Olds. employed about six employees to wash, clean and do rustproofing work on cars. The cleaning and rustproofing was, of course, only one of a number of services provided by the service department. The rustproofing and cleaning work was done on cars prior to them being delivered to purchasers, as well as on cars brought in for servicing if such was requested by the customer. In addition, a number of cars were brought into the dealership solely to be washed. A certain amount of rustproofing and washing work came into Central Chev. Olds. from other nearby dealerships which did not do this type of work themselves, but rather contracted it out.

5. Mr. McCoy took over the operations of Central Chev. Olds. in July of 1981. Shortly thereafter, he decided that the dealership should no longer perform its own washing and rustproofing work but instead contract it out to other firms. As a result of this decision, in October of 1981, the six employees of Central Chev. Olds. who had been performing the work were laid off, and the work contracted out to a firm called "Q.A.P.". There is little evidence before the Board relating to the activities of Q.A.P. It appears, however, that Q.A.P. carried on business at facilities situated at 2 Bathurst Street in the City of London, some distance away from the Central Chev. Olds. dealership, and that the owners of Q.A.P. had no relationship with either Central Chev. Olds. or Pat-Har Holdings Ltd. The collective agreement binding on Central Chev. Olds. and the union contains no restriction on the subcontracting out of work, and at the time the union raised no legal objections to the contracting of work to Q.A.P. In addition, no claim was made that the transfer of the cleaning and rustproofing functions to Q.A.P. constituted the "sale" of part of a "business" within the meaning of section 63 of the Act.

6. Mr. McCoy testified that in June of 1982, Central Chev. Olds. stopped doing business with Q.A.P., and began to contract out its rustproofing and car washing work to a firm named "Permashine". There is almost no evidence before the Board relating to either the ownership or operations of Permashine. Mr. McCoy did, however, indicate that neither he, nor the companies under his control, had any direct involvement with Permashine.

7. In July of 1982 Ms. Veronica Esbaugh purchased the business of Q.A.P., along

with its assets at 2 Bathurst Street, and changed the name of the business to Extend-A-Life Car Care Centre ("Extend-A-Life"). Central Chev. Olds. then stopped contracting out its washing and rustproofing work to Permashine and began to contract it out to Extend-A-Life. Ms. Esbaugh is employed as a nurse, and accordingly hired Mr. J. Foster to act as Extend-A-Life's manager. Ms. Esbaugh indicated that Mr. Foster had served in the same capacity with respect to other companies that had been performing work for Central Chev. Olds. Most of Extend-A-Life's work came from Central Chev. Olds., although the firm also obtained a certain amount of work from other dealerships.

8. During or about March of 1983, Ms. Esbaugh entered into a "partnership" with a Dr. Fred Sexton. On or about March 24, 1983, Ms. Esbaugh and Dr. Sexton incorporated 533556 Ontario Inc. with the intent of having it continue the business of Extend-A-Life under the name of the Complete Car Care Centre ("Complete Car Care"). On April 12, 1983, the numbered company formerly registered the Complete Car Care name as the name under which it was carrying on business.

9. The action of Central Chev. Olds. in contracting out its rustproofing and washing work in October of 1981 resulted in five of the dealership's bays becoming vacant. These bays remained vacant from October of 1981 until March of 1983, when they, along with part of the Central Chev. Olds. parking lot, were leased by Complete Car Care. Ms. Esbaugh testified that she and Dr. Sexton had decided to lease the space and have it serve as the base of operations for Complete Car Care since the facilities at 2 Bathurst Street had not proved very satisfactory. Complete Car Care pays Central Chev. Olds. \$1,800 per month in rent. At the time of the hearing, the parties were in the process of entering into a written lease to formalize this arrangement.

10. Along with the five bays, Complete Car Care also acquired the use of a hoist, a compressor and a power washer. Complete Car Care brought to the site certain of its own equipment, including two vacuums, a compressor and a power washer. Complete Car Care provides all of the supplies that it uses in its operations. The day-to-day operations of Complete Car Care are carried on under the direction of Mr. Foster, although Ms. Esbaugh also spends some time at the site. Complete Car Care employs, and pays, approximately six employees, none of whom had previously worked for Central Chev. Olds. Direction and control over these employees is exercised only by the management of Complete Car Care, although Central Chev. Olds. does set a minimum standard for the work performed for the dealership.

11. Currently about sixty per cent of Complete Car Care's work emanates from Central Chev. Olds. The dealership's customers deal only with the staff of Central Chev. Olds. and have no contact with the employees of Complete Car Care. Central Chev. Olds. contracts work to Complete Car Care by way of individual purchase orders, there being an arrangement relating to how much is to be charged by Complete Car Care for various types of work. Although Central Chev. Olds. currently contracts out all of its washing and rustproofing work to Complete Car Care, it is under no legal obligation to do so. The dealership is free to at any time start contracting out the work elsewhere or (apart from space considerations), to once again start doing the work itself.

12. As already noted, Central Chev. Olds. accounts for about sixty per cent of the work performed by Complete Car Care. Most of the remaining forty per cent is work that is contracted to Complete Car Care by other automotive dealerships as well as by the London Public

Utilities Commission, which in April of 1983 entered into a contract to have Complete Car Care do work on its vehicles. Ms. Esbaugh testified that Complete Car Care is seeking to increase its work from sources other than Central Chev. Olds.

13. The union takes the position that pursuant to the provisions of section 63 of the Act, Central Chev. Olds. either "sold" the rustproofing and washing part of its business to Complete Car Care, or there occurred a series of "sales" between various firms which accomplished the same result. The relevant portions of section 63 provide as follows:

"63.-(1) In this section,

(a) 'business' includes a part or parts thereof;

(b) 'sells' includes leases, transfers and any other manner of disposition, and 'sold' and 'sale' have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application."

14. The effect of section 63 is to preserve the labour relations status quo by transforming collective bargaining rights into a form of "vested interest", which attaches to the business entity. To accomplish this objective the statute gives a special meaning to the term "sale", envisages the continuation of bargaining rights in a severable "part" of an employer's operation, abrogates the notion of privity of contract, and virtually eliminates the significance of the separate legal identity of the new employer. In *Marvel Jewelry Limited* [1975] OLRB Rep. September 733, the Board summarized the effect of section 63 (then section 55) as follows:

"Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business regardless of any change of ownership."

15. Given the purpose and broad language of section 63, the Board has given the section a liberal interpretation and not placed undue reliance on the legal form which a business disposition happens to take. This does not mean, however, that every business decision which prejudicially affects a union's bargaining rights will be viewed as falling within the ambit of section 63. In particular, as the Board indicated in the *Metropolitan Parking Inc.* case [1979]

OLRB Rep. Dec. 1193, the transfer of work standing by itself will generally not be sufficient to trigger the application of section 63:

“Despite the labour relations focus of the statute “the business” is not synonymous with its employees or their work. In exceptional circumstances the accumulated skills, ability, know how or business contacts of the employees may be so crucial, or irreplaceable, that their loss would mean the demise of all or part of the business as a going concern; but these cases are rare. For the most part, the continued employment of the predecessor’s employees is only one factor to be considered. The reason for this is succinctly stated by the Canada Labour Relations Board in *N.A.B.E.T. v. Radio CJC Ltd. et al*, (1978) 1 Canadian LRBR 565:

The purpose of the successorship provisions is to preserve bargaining rights in spite of changes in the ownership or control of an enterprise. Bargaining rights are typically granted to a trade union as bargaining agent for a unit of employees or an employer employed in certain classifications or at a certain location, or for all employees with specified exceptions. *Bargaining rights do not attach to certain specific employees as individuals*. Therefore, in defining the concept of business for the purpose of successorship, it would be incorrect to focus upon whether certain identifiable persons formerly in the employ of A are now in the employ of B. Furthermore, to focus on that question would invite employers to avoid the successorship provisions by refusing to maintain continuity of the individuals employed.

A key to the protecting of bargaining rights must be whether there is continuity in the nature of the work done (i.e. in classifications or job content for which the union was certified) not in the actual persons who perform it...

But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand.

(emphasis added)

A continuity of the work and/or the employees is significant, but it is not always sufficient, to sustain a finding of successorship. This Board adopted a similar view in *British America Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 – a case which, like the present one, involved the consequences of a loss of a contract.

There are limits, however, to the extent to which section 55 (now

section 63) can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when that business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.

This focus of section 55 is the business entity – the employer’s total economic organization – not simply the work which the employees perform.”

16. At the time Central Chev. Olds. contracted out its cleaning’ and rustproofing work to Q.A.P. nothing was transferred to Q.A.P. except the work itself. In our view, this transfer of work cannot reasonably be characterized as having been a sale of all or part of Central Chev. Olds.’ business. See: *Ontario 474619 Ltd.* [1981] OLRB Rep. Oct. 1452. At the time in question the union appears to have been of the same view since it made no attempt to bind Q.A.P. to its collective agreement. Central Chev. Olds. subsequently contracted out the work involved to a succession of firms, including Extend-A-Life at 2 Bathurst Street. The movement of the work to Extend-A-Life did not, in our view, involve a sale of all or part of the business of Central Chev. Olds. The question, accordingly, becomes whether the setting up of Complete Car Care to continue the business of Extend-A-Life and the movement of its operations from 2 Bathurst Street into space leased from Central Chev. Olds. was sufficient to turn the existing sub-contracting arrangement into a sale of a business from Central Chev. Olds. to Complete Car Care. We think not. Rather the more reasonable interpretation of what occurred is that Complete Car Care continued to carry on the pre-existing business of Extend-A-Life, but from a different location than before. In these circumstances, we are satisfied that there has not been a sale of a business from Central Chev. Olds. under section 63 of the Act.

17. As an alternative argument, the union contends that section 1(4) is applicable. In the view of the union, Central Chev. Olds. and Complete Car Care are carrying on associated or related activities under common direction or control, and accordingly, the Board should treat the two firms as a single employer and declare that Complete Car Care is bound by the terms of Central Chev. Olds.’ collective agreement. On the evidence, it is apparent that the two firms are not under common ownership, and that they carry on their day-to-day operations under different management. Central Chev. Olds. is ultimately owned by Mr. and Mrs. McCoy and Mr. McCoy, with the assistance of a number of departmental managers, directs the affairs of the company. Complete Car Care, on the other hand, is ultimately owned by Ms. Esbaugh and Dr. Sexton, and its activities are carried on under the day-to-day direction of Mr. Foster. The union does not dispute these facts, but contends that through their sub-contracting arrangement Central Chev. Olds. does in reality control the operations of Complete Car Care.

18. The Board has previously accepted the proposition that sub-contracting relationships can under certain circumstances bring two nominally independent firms within the ambit of section 1(4). As was stated in the *Charming Hostess* case [1982] OLRB Rep. April 582, the

more closely a firm which has contracted out work controls when, where, how, by whom and at what place the work is to be done, the more the activities of the two firms will appear to be under joint control or direction. Indeed, the degree of control may be so great as to lead to the conclusion that the firm allegedly contracting-out certain work is in fact the true employer of the individuals performing it, and that they are not employees of the "sub-contractor" at all. See: *K Mart Canada Limited*, [1983] OLRB Rep. May 649. In addition, a section 1(4) declaration may be appropriate in instances where a sub-contractor is effectively dominated by the firm letting out the work, and it appears the true purpose of the sub-contract was not to provide the dominant firm with independent managerial or employee skills, but rather to provide it with a separate "non-union" corporate vehicle with which it could continue performing the same work as before but outside of any collective bargaining obligations. See: *J. H. Normick Inc.* [1979] OLRB Rep. Dec. 1176 and *Donald A. Foley Limited* [1980] OLRB Rep. Apr. 436.

19. In assessing the circumstances of the case before us, we consider it noteworthy that there is apparently an accepted practice in the automotive dealership field of contracting out the washing and rustproofing of cars. One can infer from this that the work involved is not viewed as being so integral or "core" to the operation of a dealership that the management of the dealership must keep direct control over the performance of the work. This is demonstrated by the practice of Central Chev. Olds. The firm contracts out the work to Complete Car Care at a fixed price, with Complete Car Care deciding how the work is to be performed and by whom. Complete Car Care supervises and pays its own employees. This is *not* a case where it can reasonably be said that Central Chev. Olds. is the true employer of the individuals performing the work, or that the two firms are being carried on under joint control or direction. In addition, Complete Car Care is not under the type of domination of Central Chev. Olds. as would justify a section 1(4) declaration. Fully 40 per cent of Complete Car Care's work comes from other dealerships and from the London Public Utilities Commission, and the firm is currently seeking to expand its work from sources other than Central Chev. Olds. In the result, we do not believe that this is the type of situation in which section 1(4) is applicable.

20. Both of these applications are hereby dismissed.

0576-83-U Retail Clerks Union, Local 409, Complainant, **Dryden Truck Stop Inc.** (formerly Farelane Properties Ltd.), Respondent

Trade Union – Unfair Labour Practice – Union not requesting full dues deduction clause made available by section 43 during negotiations for first agreement – Employer bound to deduct only from employees who authorize as per agreement provision – Board finding union entitled to make request under section 43 for full dues deduction during term of first agreement

BEFORE: R. M. Brown, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Michael Fraser for the applicant; Chris Eames and Ken Hallson for the respondent.*

DECISION OF R. M. BROWN, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; August 24, 1983

1. This is a complaint under section 89 of the *Labour Relations Act*. The union contends that the respondent has failed to comply with section 43(1) of the Act. That section provides:

43.- (1) Except in the construction industry and subject to section 47, where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union forthwith.

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3. The parties are signatories to a first collective agreement executed on January 13, 1982 and running from that date to October 31, 1983. Article 7 addresses union dues.

7.01 The Employer shall deduct each month from the wages of all employees in the bargaining unit who have completed their probationary period, and signed a payroll deduction form, such regular monthly dues as may be adopted and designated by the Union. The Union dues shall be deducted from the employee's pay each month beginning with the month the employee completes the probationary period.

7.04 The Union shall indemnify and save the Employer harmless from any and all claims for amounts deducted from pay and remitted under the terms of this Article.

4. After the agreement came into effect, the employer initially deducted dues from all

employees who had completed their probationary period. Eventually, some employees complained that the employer was not entitled by article 7.01 to make a deduction from the paycheck of any employee who had not signed a payroll deduction form. Several employees did not issue an authorization upon completion of their probation, and the employer did not make deductions from their paychecks.

5. On May 20, 1983 the union requested the employer to comply with the collective agreement and the *Labour Relations Act*. In a complaint to the Board dated June 15, the union alleged section 43 has been violated on or about June 10. On the advice of counsel, the employer has deducted dues for all non-probationary employees for the period since June 10. These monies are being held in a trust account.

6. The complainant claimed a request pursuant to section 43 was made at the time that the contract was negotiated. The only evidence offered to support this contention was article 7.01. The Board was asked to find this provision required the employer to deduct union dues from all employees. Counsel for the union argued the requirement of a payroll deduction form was intended to save the employer from any liability to employees, and was not meant to allow individual employees to decide whether or not to contribute to the union. In the alternative, counsel submitted the union made a request pursuant to section 43(1) of the Act on May 20, and the employer is obliged by the statute to deduct and remit dues from that date forward.

7. Counsel for the respondent argued article 7.01 obligates the employer to deduct dues only for employees who sign an authorization. Turning to the Act, he contended a request under section 43 can only be made in the course of bargaining for a collective agreement, not during the term of a contract. Counsel drew a distinction between sections 41, 42, 44 and 45 which mandate terms – relating to exclusivity, work stoppage and arbitration – and section 43 which is not operative until triggered by a union request. Counsel suggested this difference implies that a union can invoke section 43 only during bargaining. He emphasized section 43 speaks of a provision being “included in a collective agreement” and suggested a topic can only be included when the contract is open for negotiation. Reference was also made to the heading which appears before this part of the Act – “Contents of Collective Agreement”. The Board was reminded section 52(5) permits a collective agreement to be revised by *mutual* consent. Finally, counsel contended the Board’s powers under section 89 do not permit it to amend a collective agreement.

8. The Board finds article 7.01 is not evidence that a request was made under section 43 at the bargaining table. The collective agreement does not oblige the employer to deduct dues for employees who have not executed a payroll deduction form or for probationary employees. The language of the collective agreement is clear on these points. Article 7.01 is not simply designed to protect the employer from liability. That objective is accomplished by the indemnity set out in article 7.04.

9. Can a union invoke section 43 during the life of a collective agreement? Section 43 was introduced by *The Labour Relations Amendment Act* 1980 (No. 2), S.O. 1980, c. 34. Section 2(1) of that Act provides:

Subsection 1 of section 36a [now 43] of the *Labour Relations Act*, as re-enacted by subsection 1 of this section, does not apply to a collective

agreement in operation on the day this section comes into force but applies to every collective agreement that is renewed or made after that date.

The legislative intention is clear from this provision which is omitted from the consolidated statutes – perhaps because it was mistakenly perceived to be transitory in nature. A contract that predates the legislation cannot be reopened, but a collective agreement entered into after section 43(1) came into force can be.

10. The rationale for allowing a request to be made at this point in time was set out in *North American Plastics Company Limited*, [1976] OLRB Rep. May 210. The statutory provision at issue was the original section 36a(1), the predecessor to section 43(1). The only difference between the two is the union security arrangement contemplated by the former allowed each individual employee to decide whether or not to contribute to the union, whereas the latter does not. In *North American Plastics* the Board said:

The legislature in its wisdom, has effectively removed from the sphere of collective bargaining union recognition (section 35), strike/lockout prohibition (section 36) and binding rights arbitration provisions (section 37). Similarly the legislature in its most recent enactments has decided that in the furtherance of “*harmonious relations* between employers and employees” the often divisive issue of even a minimal form of union security should be removed from the sphere of collective bargaining in order to better facilitate that process. The statute now directs in section 36a that upon the request of the bargaining agent there shall be included the prescribed provision. It is no longer a bargainable item to the extent that the unilateral request of the bargaining agent triggers the section and the inclusion of the required provision. The interpretation urged by the respondent is not only at variance with the clear meaning of the words of the section but it lends a meaning contrary to the purpose of the section in that it would *require* that the issue be dealt with at the bargaining table. This is not to say, however, that the section could not be triggered during the bargaining process but rather that the section cannot be interpreted as requiring that it be triggered only during the bargaining process.

11. The Board finds that the complainant did not make a request pursuant to section 43(1) until its complaint dated June 15 was received by the respondent. The union’s letter of May 20 makes no mention of section 43(1) and does not even refer to the union’s statutory right to a compulsory checkoff arrangement.

12. We direct the respondent to agree to the union’s request and to pay to the complainant regular union dues, as defined by section 43(2), for the period since the request was made.

DECISION OF BOARD MEMBER J. A. RONSON;

1. We are dealing with the first collective agreement that the parties have negotiated.
2. It seems to me that section 43 of the *Labour Relations Act* is permissive in nature.

It allows the parties to bargain about the deduction and remittance of dues, but it does not allow an impasse to be created over the issue. Section 43 is not automatic or mandatory in the same sense as sections 41, 42, 44 and 45 of the Act.

3. Since this is a first agreement it is clear that the parties chose not to follow section 43 and indeed struck a bargain embodied in article 7.01 of the collective agreement. That being the case, I would hold the applicant to its bargain during the life of the collective agreement and dismiss the application.

0761-83-U Michel Cyr, Complainant, v. Mine Mill Union Local 598, Respondent, v. Falconbridge Limited, Intervener

Duty of Fair Representation – Unfair Labour Practice – Collective Agreement requiring promotions to be on basis of seniority and ability – Union practice to not apply collective agreement requirement to disabled employees – Able-bodied complainant adversely affected by union practice – Grievance considered by union officials and rejected by membership – Accommodation of needs of disabled employees reasonable and laudable – No breach of duty of fair representation

BEFORE: R. O. MacDowell, Vice-Chairman.

APPEARANCES: *Michel J. Cyr on his own behalf; Elizabeth McIntyre, Ed Leger, Jim Sheehan and Michele O'Connor for the respondent; Richard Thompson for the intervener.*

DECISION OF THE BOARD; August 12, 1983

1. This is the complaint of Michel Cyr who alleges that the respondent union has contravened section 68 of the *Labour Relations Act*. Mr. Cyr contends that the union's established policy of giving special consideration to disabled workers discriminates against healthy employees, like himself, and is unlawful. Section 68 reads as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The facts are not substantially in dispute. Mr. Cyr is one of approximately 1700 bargaining unit employees employed by Falconbridge Nickel Company Limited in its operations in Sudbury, Ontario. These employees, including the complainant, are represented by the respondent trade union. Their terms and conditions of employment are prescribed in a collective agreement which is renegotiated from time to time. That collective agreement contains a job posting procedure so that employees interested in promotion can make application or "bid" for the job.

3. The agreement requires that promotions be awarded on the basis of an employee's seniority and ability, and there is no question that the clause is one of general application which, by its terms, should apply to all employees in the bargaining unit. But that is not how it has been applied in practice. For more than twenty-five years the union and employer have agreed to waive the strict requirements of the collective agreement in the case of a limited number of jobs which could be done by disabled workers who would otherwise be unemployed altogether. These "restricted" or "light duty" jobs are not posted at all. They are offered to senior employees who would be incapable of doing anything else. As a result, able-bodied individuals like the complainant are denied certain work opportunities to which they might otherwise be entitled if the terms of the collective agreement were strictly applied.

4. The evidence establishes that at the present time there are about 90 employees working in restricted duty jobs which, over the years, have not been posted. For the most part, the incumbents are employees with considerable seniority who would otherwise be unemployable. The evidence further establishes that if these employees were forced to rely upon either their disability pension entitlement or workers' compensation payments, many of them would face severe financial hardship. But that is not the complainant's concern. He was quite candid in his submission to the Board that these individuals should be put out of their jobs even if they have no disability pension. His position is that the collective agreement should be applied in accordance with its terms and if there are to be any exceptions they should be spelled out expressly.

5. The complainant has been an employee for approximately ten years, but he only found out about the disability policy recently, when he learned that the job of switchman had not been posted and that the incumbent in that position got the job because of his disability. It is interesting to note that this employee has more than fourteen years seniority, so that even if the job had been posted the complainant would not have been the successful applicant. The complainant asserts, however, that he is interested in the principle of equal treatment and equal application of the agreement. He argues that even if he were not successful, his rights under the agreement should be vindicated.

6. On or about April 26, 1983, Mr. Cyr approached his Local shop steward to discuss his concerns. He demanded that the steward file a policy grievance on his behalf, demanding that: the company revert to the strict terms of the agreement, post the switchman's job, and discontinue its practice of giving preference in some cases to disabled employees. At first, the shop steward refused, since the grievance would result in the rescission of an arrangement with the company which had been in place for more than twenty-five years. Eventually, however, the union did agree to entertain Mr. Cyr's grievance – in part, it would appear, because he threatened to file a complaint with this Board if the union did not do so.

7. Mr. Cyr's demand that the union and employer abandon their established policy respecting disabled workers provoked considerable discussion. Neither the union nor the company was enthusiastic about rescinding a long-established practice designed to help disadvantaged union members – notwithstanding the terms of the collective agreement. That practice had been in place for years, had a valid humanitarian purpose, and was well accepted by the local membership. It had never been seriously questioned before.

8. The company's operations in Sudbury are divided functionally into three divisions (mines, services, and plant), and geographically into an eastern and western section. There

is a “chief steward” assigned to each division in each geographic location (for example, chief steward – mining – east). Thus that there are six chief stewards in all. Below them there is a network of stewards in various parts of the employer’s operation who are responsible for the “first line” administration of the collective agreement and the adjustment of problems on the job. In each of the eastern and western sections, the stewards and the chief stewards meet on a regular basis. Those meetings provided one of the several forums for discussion of Mr. Cyr’s complaint.

9. On or about May 2nd, the three chief stewards in the eastern group, together with about twenty-five shop stewards from their section, met and, *inter alia*, discussed Mr. Cyr’s position. Those who attended were unanimously of the view that the union should adhere to its established policy. The western stewards group also discussed the matter. They were of the same opinion – although there was some concern about how the policy should be maintained in face of the language of the agreement and Mr. Cyr’s challenge. On May 4, 1983, the executive board of the union, consisting of its elected officials, also discussed the matter. They reached the same conclusion. On the same day, there was a “rank and file” membership meeting where the issue was debated. At the meeting there was a consensus that there should be no alteration of the status quo. Mr. Cyr was present and participated in that debate.

10. Mr. Cyr’s grievance was dropped at the third stage. The decision not to proceed to arbitration was taken by the arbitration committee which includes the six chief stewards who were both aware of, and participated in, the discussions which have been outlined above. They saw no point in proceeding further with the matter.

11. The decision to drop his grievance was communicated to the complainant, who was advised that, in accordance with the union’s usual practice, the decision of the arbitration committee would be put before the membership for ratification at the next regularly scheduled union meeting. Ordinarily, the decision of the arbitration committee is accepted without debate, but from time to time, discussion from the floor has resulted in further consideration being given to a member’s grievance. Mr. Cyr was extended that opportunity. He did not attend the meeting. The disposition of his grievance came up, as he had been told it would, and the membership affirmed the arbitration committee’s position.

12. Does the evidence disclose a breach of section 68 of the *Labour Relations Act*? In my view the answer is clearly no. There is no arbitrariness, discrimination or bad faith in the processing of Mr. Cyr’s grievance. On the contrary, the grievance was entertained, processed to the third step and discussed at some length and at various levels by a variety of union officials. Subsequently, Mr. Cyr’s position was raised and rejected at a union membership meeting and he chose not to seek further reconsideration at a subsequent membership meeting following the arbitration committee’s final decision to drop his grievance. There was nothing cursory, perfunctory, or improper in the way that his grievance was handled.

13. Nor is there anything illegal about the union’s agreement with the company that compliance with the job posting provisions of the agreement would be waived in the case of certain job openings suitable for disabled workers. In my view this is a perfectly reasonable and laudable effort by the union and the employer to recognize and accommodate the needs of these disadvantaged individuals. The effect may be to confer a benefit to which they might not be entitled under the strict terms of the collective agreement, but this is not the kind of invidious “discrimination” to which section 68 of the *Labour Relations Act* is directed. The

seniority provision itself “discriminates” in the general sense that it gives a greater chance of promotion to persons with more years of service, and if the union is entitled, as it is, to create certain rights for senior employees through the collective bargaining process, it is equally entitled to limit those rights where there are good collective bargaining reasons for doing so. Such reasons clearly exist here, and I see no reason to interfere with an aspect of “the bargain” which has been in place for decades and is clearly acceptable to the union and its members.

14. It is said by the complainant that any limitation on the application of the job posting provisions ought to appear in the language of the collective agreement itself. I cannot accept that submission. It might have been wiser for the parties (and certainly would have been a complete answer to this aspect of Mr. Cyr’s complaint) if the parties had a formal letter of understanding that efforts would be made to assist disabled employees. However, I do not think it is necessary or even desirable that every facet of the complex web of understandings which make up a collective bargaining relationship must be reduced to writing and form part of the collective agreement. If the parties do not do so they risk misunderstandings but, in the circumstances of this case, I cannot find that there is anything illegal about the union’s failure to include in the collective agreement an accepted policy of some twenty-five years standing which appears to have been well known to almost everyone except the complainant.

15. For the foregoing reasons, this complaint is dismissed.

0701-83-R Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351, Applicant, v. **Four Seasons Hotel Toronto** (Four Seasons Yorkville), Respondent, v. Group of Employees, Objectors

Certification – Petition – Petition circulated after meeting between employees and management – Management taking notes as each employee disclosed position – Appearance of close nexus between originator of petition and management – Petition not voluntary

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members F. S. Cooke and W. H. Wightman.

DECISION OF RICHARD M. BROWN, VICE-CHAIRMAN, AND BOARD MEMBER S. COOKE; August 8, 1983

1. This is an application for certification in which the parties met with a Board Officer before the hearing, reached agreement on all of the matters in dispute between them, except the significance of a petition filed by the interveners, and waived their right to a formal hearing on the agreed matters.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board finds the following bar-

gaining unit to be appropriate: all front desk employees of the respondent at 21 Avenue Road in the City of Toronto, except assistant front desk manager and persons above the rank of assistant front desk manager, office clerical and sales staff, reservation clerks, concierge, audit department staff, security staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons covered by a subsisting collective agreement.

4. As this unit embraces only a small portion of all office, clerical and technical employees, it may give rise to undue fragmentation in the structure of bargaining. The unit agreed to by the parties was accepted by the Board in this case. However, in future cases in the hotel industry, the Board may require the parties to demonstrate that such a unit is appropriate for collective bargaining.

5. The applicant has filed documentary evidence which establishes that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on July 12, 1983, the terminal date fixed for this application and the date which the Board established, pursuant to section 103(2)(j) of the Act, to be the time for determining membership under section 7(1) of the Act. This evidence is in the form of membership cards containing a combination application for membership and receipt. The applications are signed by the individual employee concerned, and the receipt is countersigned by the collector and acknowledges the payment of one dollar. These cards comply with the membership criteria prescribed by section 1(1)(l) of the Act and established by the Board pursuant to section 103(2)(j). The documentary evidence of membership is supported by a properly completed Form 9, Statutory Declaration, attesting to its authenticity. There is nothing to suggest the employees who signed these cards did not do so because they decided of their own free will to be represented by the applicant. Accordingly, in the absence of other evidence relating to membership, the union has a sufficient level of support to be certified pursuant to section 7(3) of the Act without recourse to a vote.

6. However, a group of employees have also filed a petition signed by a number of people who are opposed to the certification of the applicant. This petition contains the names of some individuals who previously signed membership cards and paid one dollar to the applicant, and who thereby became members of the union within the meaning of section 1(1)(l) of the Act. Indeed, less than fifty-five per cent of the employees in the unit signed a card but did not sign the petition. Consequently, if the employees whose names appear on both a card and the petition signed the petition voluntarily, the Board would normally exercise its discretion under section 7(2) of the Act by ordering a vote. Conversely, a petition spawned by improper employer influence, either real or perceived, would be disregarded and would not preclude certification on the basis of membership evidence.

7. The Board's policy of refusing to order a vote in response to an involuntary petition is best understood when viewed against the backdrop of certification in the absence of a petition. Section 7 of the *Labour Relations Act* directs the Board to order a vote when a trade union demonstrates that between forty-five and fifty-five per cent of the employees in the bargaining unit are union members. However, the Board is empowered to issue a certificate, without a vote, upon application by a trade union which has signed more than fifty-five per cent of the employees, although the Board may conduct a vote. Over the years the Board's general policy has been not to order a vote in these circumstances. The vast majority of all certificates are granted on the basis of membership evidence. In fiscal year 1981-82 only 80

of 961 certificates resulted from a vote. The Act has been amended on numerous occasions, but the Legislature has made no effort to change this practice. Indeed, in 1975 the statutory threshold for certification without a vote was lowered from sixty-five to fifty-five per cent.

8. A petition signed by employees who had earlier become union members appears in a small minority of certification cases. A change of heart may be produced by a spirited debate among employees concerning the virtues of collective bargaining. In British Columbia and under the *Canada Labour Code* dialogue among employees is cut off when the union applies for certification. This is the date for determining the level of union support, and any shifts in allegiance after this time are disregarded. See *Plateau Mills Ltd.*, [1977] 1 Can. LRBR (B.C.) and *Canadian Imperial Bank of Commerce*, [1979] 1 Can. LRBR 19 (Can.). A longer time frame for debate among employees is allowed in Ontario. The regulations issued under the Act call for the establishment of a terminal date – between five and ten days after the date of application – and direct the Board not to accept evidence relating to membership filed after the terminal date. A petition filed before this time is taken into consideration so long as it is voluntary in the sense that the petitioners were not motivated by employer influence, either real or perceived. A voluntary petition which places a union's claim to be supported by more than fifty-five per cent of the employees in doubt, because some employees have signed a card first and then the petition, will normally result in a vote.

9. But an involuntary petition is of no assistance in determining how many employees want union representation. Instead this document is a gauge of the responsiveness of employees to employer influence. As the Board said in *Pigott Motors 1961*, 63 CLLC ¶16,264:

The Labour Relations Act contains detailed provisions designed to protect the rights of employees to become members of, and to select or reject a particular or any trade union as their collective bargaining agent and to bargain collectively or individually with their employer. It is an important function and duty of this Board under the legislation to be circumspect and vigilant to see that these rights are preserved and not made illusory.

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interest and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document, such as a petition, signed by employees purporting to express opposition to the certification

of a trade union truly and accurately reflects the voluntary wishes of the signatories. (See for instance, the *Sinnott News Case*, CCH Canadian Labour Law Reporter, 1955-59, *Transfer Binder* ¶16,236, at p. 13,201). In seeking this assurance, the Board draws no distinction between documents which purport to express a desire on the part of employees to resign from the union and those which purport merely to express opposition to the applicant as their collective bargaining agent. In other words, for this purpose, it does not seek to distinguish between the two matters of membership and representation.

The reason why the Board does not order a vote in the context of an involuntary petition is obvious. In the absence of a petition, public policy had declared cards are a better indicia of union support than a vote. An involuntary petition tips the scales even further in favour of documentary membership evidence over the ballot box.

10. Is the petition at hand voluntary? It was initiated by Philip Ryback and was signed by him and two other employees. It was drafted and the signatures were affixed at 400 University Avenue immediately before it was hand delivered to the Board on July 12, 1983. Mr. Ryback testified about telephone conversations with two unidentified lawyers and an unspecified government officer, and about a meeting attended by the front desk staff and members of management.

11. Mr. Ryback was concerned by statements made by Michael Hefferman while soliciting union membership. According to Ryback, Hefferman said the union would protect employees against layoffs in times of slow business, would achieve "unreal" wage increases, and would establish a separate local for these employees. Membership cards were signed on June 27th and June 28th. At this point, Philip Ryback decided to investigate the subject of union representation and turned to the yellow pages of the telephone book under the heading "Lawyers - Labour Relations". The first lawyer called turned out to represent trade unions. They discussed the pros and cons of collective bargaining. Mr. Ryback then called a few other numbers until he reached a person who specialized in representing employers. This lawyer raised the topic of a petition. Mr. Ryback could not recall the names of the counsel with whom he spoke.

12. Ryback later telephoned Ann King, the assistant front desk manager, to arrange a meeting of the front desk employees and the general manager, Mr. Mutton. King agreed to ask Mutton to attend and to arrange for the use of a hotel board room. On June 29th, she posted a notice of the meeting which was to be held the next day:

To: All Front Office Staff

From: A. King

I have been asked by some members of the front office to advise you of a meeting which has been scheduled for tomorrow (Thursday) afternoon to discuss current conditions with Mr. N. Mutton. All are welcome and encouraged to attend. (Approx. 4 p.m.)

A King

cc. Mr. N. Mutton

Mr. Ryback claimed to have posted the notice himself, but when faced with a copy of the above document he retracted this statement.

13. The meeting took place as planned. In attendance were all front desk employees – except the night manager and one other person – Mr. Mutton, and Helen Wilson from the personnel department. Two or three of the employees were on working time, and were replaced at the front desk by others. The meeting lasted approximately two hours. The group sat around a large table with Mr. Mutton off centre on one side. Helen Wilson sat opposite and took notes of what was said.

14. Near the outset, Mr. Mutton announced he had been informed by the union that it had filed an application for certification. He also said he couldn't talk about the union. Ryback spoke up and invited his fellow employees to air their concerns. The meeting proceeded with each employee expressing his or her opinions in turn. After each spoke, general discussions ensued. Employees talked about their problems such as low salaries and poor communication with the front desk manager. Initially, Mr. Ryback testified everyone expressed their views about what a union could or could not achieve for them. Later in the hearing, he said three or four employees stated their position on the union, and the attitudes of some others could be inferred from their comments or employment relations. At times the meeting became "pretty heated". As the gathering drew to a close, Mr. Mutton said he was embarrassed that things had gone this far. Mr. Ryback interpreted this to mean the general manager was sorry that the problems identified had not been worked out between the employees and their employer. This comment and the announcement about the application for certification was all Mr. Mutton said. The meeting on June 30th was the first time the front desk employees had met as a group with Mr. Mutton. However, front desk staff meetings have been held on an erratic basis, approximately once each month, in the hotel board room.

15. After the June 30th gathering, Ryback made some more telephone inquiries. Ultimately he spoke to someone at a government office who explained the Board's petition procedures to him.

16. Counsel for the respondent observed that all three interveners appeared before the Board in support of their petition. He stressed the meeting of June 30th was held at Mr. Ryback's request and Mr. Mutton's participation in the gathering was minimal. Counsel relied upon a recent Board decision, *Catfish Calhoun Inc.*, [1981] OLRB Rep. Nov. 1551, which accepted as voluntary a petition circulated after a meeting called by the employer.

17. Counsel for the applicant reminded the Board that the onus of establishing that a petition is voluntary rests with those who rely upon. He contended petitions are viewed with suspicion because of the responsive nature of the relation of employee to employer. The gathering of June 30th was characterized as involving a captive audience. The employer's conduct in recording what was said, including statements about the union, was emphasized. Counsel also noted that Mutton's demonstrated willingness to listen to employees carried an implicit promise to remedy their complaint about poor communications. Counsel referred to several cases in which a petition circulated after a gathering of employees and management representatives was found to be involuntary.

18. The onus of demonstrating that a petition is voluntary rests upon those who present it: *Baltimore Aircoil Interamerical Corporation*, [1982] OLRB Rep. Oct. 1387. In the most

blatant cases, the employer actively participates in the origination and circulation of the petition, but the Board is on guard against subtle variations on this theme. The perceptions of employees are as important as the actions and motives of management. A petition may be tainted by employer conduct which is reasonably perceived to be motivated by anti-union sentiment even though it is not: *Mitten Industries Galt Limited*, [1979] OLRB Rep. Mar. 154. Similarly, actions by petitioners which give rise to a reasonable perception of employer support may lead the Board to discount a petition: *Baltimore Aircoil Interamerican Corporation*, *supra*.

19. This is not the first time the Board has encountered a petition circulated after a meeting of employees and management representatives. The earliest decision cited by counsel for the applicant is *Hayes Steel Products Limited*, [1964] OLRB Rep. Apr. 30. In that case the company president called employees together during working hours and indignantly suggested they reconsider their decision to join a union. Subsequently, a petition was openly circulated during working hours. In rejecting the petition because it did not record the voluntary wishes of employees, the Board declined to decide whether the employer had exceeded the free speech proviso in the statute.

20. In *Parnell Vending Limited*, [1965] OLRB Rep. Apr. 5, the sales manager approached each employee individually and advised them to think about their response to the union's organizing campaign. Employees later received their first invitation to present grievances at a gathering chaired by the company president. He read out the sections of the statute pertaining to the right of employees to join a union. The employee who later circulated the petition then asked his fellow employees what complaints they had to cause them to turn to the union. A lengthy discussion of working conditions followed. The next day the president and the employee who initiated the petition met for one-half hour. Their testimony about this meeting was evasive, leading the Board to conclude the employer gave "tacit support" to the union's opponents. The petition was accordingly discounted.

21. In *MacLean-Hunter Publishing Company Limited*, [1967] OLRB Rep. Nov. 759 the vice-president of the company instructed foremen to make inquiries among employees about the union. A meeting was called at the end of the day shift, and employers were told by foremen that attendance was not required. The vice-president opened the meeting by telling employees that the decision as to whether they wanted a union was theirs to make. He then explicitly outlined the procedure for filing a petition. A petition was later openly circulated during working hours. It was viewed by the Board as involuntary.

22. Another decision relied upon by the applicant is *Mitten Industries Galt Limited*, [1975] OLRB Rep. Mar. 154. Once again the company president convened a meeting. It was held at the end of the day shift when night shift employees in attendance would normally have been at work. The employer's intention to comply with the law was declared in the midst of references to bankruptcy and layoffs. Employees who had joined the union were reminded they could change their mind and reference was made to the procedure for filing a petition. The Board was "less than convinced" by the testimony of the employees who circulated the petition that the employer was not involved in it. Once again the petition was discounted. The Board reaffirmed the ruling in *Hayes Steel Products*, *supra*, that a petition may be tainted by employer conduct which does not contravene any prohibition in the statute.

23. In these four decisions a number of factors combined to lead to the conclusion that

the petition was not a true representation of the desires of employees. The relevant employer conduct included making veiled threats, telling employees to reconsider their decision to join a union, questioning individual employees about union membership, addressing a captive audience during working hours, volunteering information about petition procedures, collaboration with petitioners, and turning a blind eye to the circulation of a petition during working hours. Although the mix varied, each case involved more than one of these ingredients and most combined three or four. The Board concluded that each group of petitioners were motivated by a desire not to offend their employer, who had explicitly or implicitly expressed opposition to the union.

24. In contrast, the employer in *New Surpass Petrochemicals Limited*, [1966] OLRB Rep. Mar. 892, took a less active role. A meeting was called by management and orchestrated by the company president. He told employees they could have a union if they wished, and asked them why they wanted one. Once again there was a lengthy discussion about working conditions. In reply to a direct question, the president said he was prepared to deal with a shop committee. The petition, which was subsequently circulated, referred to such a committee and was rejected by the Board.

25. The opposite conclusion was reached in *Catfish Calhoun Inc.*, [1981] OLRB Rep. Nov. 1551. In response to inquiries from a number of employees about the union's organizing campaign, the company president invited employees to an evening meeting at the Holiday Inn. He told employees past relations in the shop would change if they were represented by a union because both he and the employees would have to deal through the union. His reply to a question about whether the shop might close was in the negative. When asked what employees could do about the union he said he could not answer. Ultimately the employees asked the president to leave because they were frustrated by his repeated explanations that he could not discuss the issues they raised.

26. Each petition case turns on its own particular facts. Although earlier decisions provide some guidance, they cannot determine the outcome. Two facets of this case give cause for concern about the voluntariness of the petition. First, Mr. Mutton watched and Ms. Wilson took notes as employees disclosed their allegiance or opposition to the union. Employees who know that management is aware of their stand may be influenced in their views by a desire to please their employer. This is why the Act throws a cloak of secrecy over membership evidence. Section 111(1) states this evidence is for the exclusive use of the Board, and the Board's practice over the years has been not to disclose such information to employers. Whatever the employer's motive in this case, its conduct pierced this veil of secrecy. Employees might reasonably have believed that their response to the union's campaign would influence their employment future.

27. The other troubling aspect of this case is the appearance of a close nexus between Mr. Ryback and the employer. At his suggestion, Ann King invited the front desk staff to their first meeting with Mr. Mutton. Ryback initiated the discussion of working conditions and union representation by calling upon his fellow employees to air their views. Mr. Mutton later said he was sorry any problems had not been resolved between employer and employee. In this context, the identity of Ryback's position with that of management was clearly demonstrated to other employees, including the two who later signed the petition when approached by Philip Ryback.

28. The evidence leads to the conclusion that the petition is not an accurate statement of the desires of the employees who signed it.

29. A certificate will be issued to the applicant for the bargaining unit described above.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. I dissent.

2. As mentioned at paragraph 8 of the majority decision legislation in the British Columbia and federal jurisdictions differ from that of Ontario. Whereas the former two jurisdictions apparently see merit in preventing even those employees who may have known nothing about the organizing efforts of the union from informing themselves as to the relative merits of union representation once the union makes application, Ontario law appears to reflect a notion that not only should they be free to acquire and consider all the facts but they should also be permitted to, both as among themselves and to the O.L.R.B., express their opposition to certification, if they so desire. Indeed Ontario law (Section 64) even appears to suggest that some of the information which employees may choose to evaluate in making their decisions can come from the employer so long as the employer does not present that information in a manner which involves the use of “coercion, intimidation, threats, promises or *undue influence*”. (my emphasis)

3. As between these two notions as to what constitutes good public policy I prefer the Ontario view even though this Board, in the exercise of its discretionary powers of interpretation, has rendered the latter half of Section 64, often referred to as the “employer free speech section of the Act”, more of a hazard than a guarantee. Nevertheless, if the ability of the employer to communicate simple facts to his employees has been cut off in Ontario, there at least appears to be nothing in Ontario law to preclude employees from discussing between themselves a matter which is going to have a profound effect on their future employment relationships. I believe that despite the emasculation of the employer free speech proviso Ontario law is at least capable of being interpreted to mean that employees may even be free to discuss these matters in the presence of their employer, particularly if the employer *says nothing in response*!

4. In the instant case the General Manager Mr. Mutton and a representative of the Personnel Department Helen Wilson were privy to such a discussion by employees on June 30th. The meeting had come about as a result of the petitioner, Mr. Ryback, having asked the assistant front desk manager Ann King for a meeting with Mr. Mutton “to air problems at the front desk” and that he, Ryback, had arranged for use of the Board Room “through catering”.

5. Notwithstanding Ryback’s stated purposes for the meeting as conveyed to Ann King, the meeting opened with an announcement by Mr. Mutton that “because the cards had been taken to the union, he could not talk about whether the union would be good or not. He had no power to say anything”.

6. There followed a “round-table” discussion of the pros and cons of union certification which apparently lasted about 15 minutes with neither Mutton nor Helen Wilson offering any comments. The balance of the two hour meeting appears to have consisted of

employees airing complaints which the witness described as flowing from “a lack of communication between management and employees”. They would physically listen but nothing would be done about that.

7. At some point late in the meeting Mutton expressed embarrassment as stated in paragraph 14, but neither he nor Helen Wilson gave any indication as to what, if anything, would be done to address the problems.

8. Ryback’s evidence is that he took Mutton to be referring to the fact that so many problems had arisen and been permitted to persist as a result of lack of communication. By way of contrast counsel for the union would have us conclude that employees hearing Mutton would have understood him to be expressing embarrassment in relation to the union organizing efforts. While I prefer Ryback’s evidence over counsel’s speculation, even if the point is conceded I would find the remark, (whatever it was, and we have only Ryback’s statement as to its tenor), innocuous rather than intimidating, threatening, coercive, holding out promise or capable of influencing the employees present.

9. Helen Wilson, the personnel representative, took notes of the meeting which the management would have understood was requested by an employee or employees who perceived that their problems resulted from a “lack of communication” with management. In these circumstances the taking of notes concerning the feelings and complaints of employees might be viewed by many as a logical action designed by management to indicate that they were *listening* to employee problems even though, in the face of an organizing drive, they had no intention of promising resolutions of them. Nor did they make any such promises was the evidence.

10. Nevertheless we are asked to view this note-taking as conduct of an intimidating nature. One hesitates to speculate if, in the interest of avoiding discomfort to employees, a more appropriate course of action for the employer in these circumstances would have been to “bug” the room or in some other fashion take the notes surreptitiously. Notwithstanding the preambular objective of the Act to encourage the practice and procedure of collective bargaining I cannot think it was the Legislature’s concurrent intent to discourage attempts to improve employer/employee relationships by resolving problems or complaints.

11. The characterization of the meeting as involving a “captive audience” requires us to draw a rather “long bow” in our interpretation of the notice from A. King, assistant front desk manager, and reproduced at paragraph 12 of the majority decision.

12. The authoress, whom the union originally requested be included in the bargaining unit, tells the addressees that *some* of their *fellow employees* have asked that *all* front desk employees be *advised* that the meeting is scheduled and goes on to *welcome and encourage* their attendance. The inducement appears to be an opportunity “to discuss current conditions with Mr. N. Mutton”.

13. The union counsel makes much of the fact that even employees scheduled for front desk duty at the time of the meeting were provided with relief workers so that they might attend. Similar arrangements were made for all front desk personnel at staff meetings held “erratically” (approximately once each month) in the same board room. I would have thought it was at least as important in the minds of people scheduled to work that the opportunity

“to discuss current conditions” with the General Manager of the hotel be given to them, as it would be to attend staff meetings.

14. Paragraph 23 of the majority decision faithfully describes the type of employer conduct which had led the Board to find a petition to be tainted and thus conclude that a secret ballot vote would not reveal the true wishes of the employees. Elsewhere it is noted that petitioners are faced with the onus of proving each of the signatories to a petition.

15. This is to be contrasted with the far less onerous responsibility facing the union with respect to the hearsay evidence it submits in the form of membership cards. As in the present case the Board is not concerned by Ryback’s testimony that the organizer attempted to “sell” union membership on the basis of promises of a wage increase Ryback considered unreal, of guarantees against lay-off and of a separate union local for these employees. Nor is the Board prepared to enquire as to whether similar promises may have been made to other employees.

16. I do not criticize this exercise of Board discretion in part because I thoroughly agree as to the need to protect the confidentiality of membership evidence for the sake of employees. I merely note the differing treatment and tests to which petitions, on the one hand, and membership cards, on the other, are subjected.

17. Since, as in the instant case, petitioners are not generally represented by counsel they have a long row to hoe if they are to succeed before us. It should be noted that employees who merely want the question resolved by secret ballot cannot get such a vote without affirming that they actively oppose the union and, to the extent that evidence of such opposition comes to us in the form of a petition, the confidentiality of those who have signed it is lost to all of those employees who are subsequently approached whether or not those subsequently approached choose to sign. One might ask if petitioners are not entitled to be protected from the possibility of being sent to Conventry by co-workers and if this lack of confidentiality as between workers, leading as it may to dividing them against one another, serves the public goal of harmonious relationships?

18. I bow to no one in my concern that employees be protected as to the confidentiality of their wishes vis-a-vis union representation, their right to give expression to those wishes without fear of reprisal and certainly their right to be collectively represented if that be the wish of the majority.

19. Unlike a government mandate, which by law must be renewed through periodic general elections, a trade union can only lose its bargaining rights through what amounts to a form of impeachment. For this reason the certification of a trade union as the sole and exclusive bargaining agent for a group of employees should be granted with the utmost care in determining the true wishes of those employees.

20. I can think of no better means of ensuring the confidentiality of an individual’s wishes or of giving an individual an opportunity to express one’s inner-most wishes than in the sanctity and privacy of a secret ballot vote.

21. I regard it as condescending in the extreme to conclude that employees would be intimidated or in anyway influenced by Mutton’s presence at their meeting, by Helen Wilson’s

note-taking or anything else in evidence before us. Moreover, even if an employer were to have engaged in all of the activities adumbrated in paragraph 23, and if an employee were to feel put upon by these activities, it strikes me that a natural reaction for such an employee would be to mark a large "X" on the secret ballot in the place designated for those supporting the union.

22. This view of human nature, coupled with my respect for the integrity of secret ballot votes conducted by the Board, prompts me to the belief that a motion by anyone for a secret ballot certification vote should trigger such a process and that it be held as expeditiously as possible.

2671-82-U Canadian Paperworkers Union, CLC and Its Local 305, Complainant, v. International Wallcoverings, A Division of International Paints (Canada) Limited, Respondent

Discharge for Union Activity – Duty to Bargain in Good Faith – Interference in Trade Unions – Remedies – Unfair Labour Practice – Discharges following assault on strike replacements and damage to van – Complaint of grievors who participated in assault dismissed – Grievors merely present at scene of incident reinstated – Failure to testify causing Board to deny compensation – Person causing damage to truck reinstated with no compensation – Person mistakenly believed to have been present at scene reinstated with full compensation – Board reviewing relevance of motive in allegations of interference under section 64 – Refusal to discuss discharges not bad faith bargaining

BEFORE: George W. Adams, Q.C., Chairman and Board Members E. J. Brady and C. Balentine.

APPEARANCES: *Douglas J. Wray, Donald Holder, Ray Bowman and Andrew Foucault for the complainant; and Robert A. MacDermid for the respondent.*

DECISION OF THE BOARD; August 5, 1983

1. The complainant complains that nine grievors dismissed during the course of a strike and whom the respondent refused to reinstate or to arbitrate their cases were dealt with by the respondent contrary to the provisions of section 3, 15, 64, 66 and 70 of the *Labour Relations Act*. The complainant requests a declaration that the Act was violated and a direction that the grievors either be reinstated or their discharge cases be remitted to an arbitrator constituted pursuant to the collective agreement now existing between the parties.

2. The complainant trade union and the respondent were parties to a collective agreement dated August 31st, 1981 and effective from May 30th, 1981 to December 31st, 1982. The respondent gave notice of its desire to terminate or amend this agreement pursuant to Article 32 by letter dated October 4th, 1982. On this same date the respondent applied to the Minister of Labour for the appointment of a conciliation officer. The complainant advised the respondent of its wish to negotiate a renewal of the collective agreement by letter dated Oc-

tober 5th, 1982. The Minister of Labour advised the parties by letter dated December 15th, 1982 that a board of conciliation would not be appointed. The respondent took the offensive by letter dated December 29th, 1982 advising bargaining unit employees that the collective agreement would expire at midnight December 31st, 1982 and that it was, at that moment, implementing new terms and conditions of employment. The letter provided:

The Collective Agreement between the Company and the Union will expire at midnight December 31st, 1982. On and after January 1st, 1983 neither the Company nor the Union are legally bound to comply with its terms. As you are aware, the Company's proposal to renew the Collective Agreement was rejected by the Union.

When you report for work on your scheduled shift previously advised, on either January 2nd or 3rd, 1983, your terms and conditions of employment will no longer be those set out in the Collective Agreement. Instead, the following will apply:

1. WAGES: Hourly wage rate will increase by 6%.
2. BENEFITS: You will continue to be entitled to the benefit plans set out in Article 19 of the expired Collective Agreement with the exception that the maximum weekly indemnity benefit shall be 66-2/3 of your weekly earnings:

The Company will continue to pay its portion of the premiums.

3. SENIORITY: Hours of Work, Overtime, Leaves of Absence, Bereavement Leaves, Statutory Holidays, Vacations, Tool Allowances and Lead Hand Premiums — these terms and conditions of employment shall continue to be administered in the same manner they were under the expired Collective Agreement.
4. UNION DUES: These will no longer be deducted: You may make direct payment to the Union.

By reporting for work on your scheduled shift, you are accepting the terms as noted above.

3. The trade union was advised of the respondent's decision in this respect by a letter of the same date and in the following terms:

Mr. Ray Bowman,
Canadian Paperworkers' Union,
701 Evans Avenue,
Suite 709,
Etobicoke, Ontario.
M9C 1A3

Dear Mr. Bowman,

The Collective Agreement between the Company and the Union expires on December 31st, 1982. As we have been unable to reach a settlement as of this date, I am writing to advise you that on and after January 31st, 1983 we will no longer be applying the terms and conditions of the Collective Agreement. Instead, we will implement our final offer. For your information, we have enclosed the text of a standard form letter sent to all employees.

4. This brisk approach to bargaining by the respondent was explained to the Board to be because bargaining had been prolonged during the preceding negotiations for the expired contract and with considerable detriment to the respondent in terms of absenteeism and loss of overtime. There was, of course, the risk of escalating tension between the parties to the point of strike and this risk materialized on January 2nd, 1983. A strike commenced as of that date.

5. What gives rise to these proceedings is the decision of the respondent to dismiss nine employees by letter dated March 2nd, 1983. Representative of these letters is the letter to Mr. G. Brinston over the signature of Mr. Clayton which reads:

Dear Mr. Brinston:

Because of your conduct on or about 6:30 a.m. on February 23, 1983, your employment with the Company is hereby terminated.

Similar letters were sent to Messrs. C. Carrier, M. McCarroll, D. McCarroll, S. Prewal, R. Richard, L. Lutes, F. Mez and R. Blanchard. D. McCarroll is President of the complainant local trade union. M. McCarroll is Vice-President and Mr. L. Lutes is Recording Secretary. The terminations followed an incident during which a van of strike replacements was intercepted at a restaurant parking lot away from the respondent's plant and a physical assault was inflicted on two of the strike replacements and on the van itself. The details of this incident are reviewed below. Immediately prior to the initial hearing in this matter the parties entered into a collective agreement dated April 23rd, 1983 effective from the date of ratification to March 31st, 1985. Paragraph 20 of the Memorandum of Agreement entitled 'Back to Work' provides in part:

(A) Upon ratification of this Agreement, employees whose employment has not been terminated prior to the date of ratification will be recalled to work in accordance with their seniority. It is agreed that seniority and service of the employees shall not be interrupted or broken by the labour dispute except for those persons whose employment was terminated prior to ratification.

The company shall not discharge, discipline or otherwise discriminate against any employee who engaged in the labour dispute. Similarly, the union agrees they will not discipline or otherwise discriminate against any employee.

(B) Any person hired by the company to work in the bargaining unit since the commencement of the labour dispute shall be terminated upon ratification of this agreement but the company may rehire such persons if staffing permits it.

(C) The parties agree to withdraw their complaints filed under section 89 of The Labour Relations Act in Board File No's. 1897-82-U and 2227-82-U. This agreement to withdraw does not apply to the union's complaint in Board File No. 2671-82-U and to any complaint the union may file under section 89 of the Labour Relations Act related to the termination of Lawrence Timmons.

Any reference to terminations in 10(A) is without prejudice to the union's section 89 Board File No. 2671-82-U and Lawrence Timmons.

6. Prior to the dismissal of the nine grievors, the respondent had taken the position that the collective agreement would not be retroactive and, subsequently, took the position that it would not agree either to reinstate the grievors or to agree that their dismissals be submitted to arbitration pursuant to any collective agreement entered into between the parties. The above Memorandum of Agreement reveals that the respondent company maintained these positions.

7. Mr. Tom Clayton, Labour Relations Manager for the respondent, testified that he arrived at his office at 8:45 a.m. on February 23rd, 1983 and was advised within minutes by the head of security that a physical altercation had occurred at the Vesta Restaurant. He was told that a number of individuals had been involved in an assault on and an interference with two of the respondent's employees trying to proceed to work. He was advised the two employees were apparently injured and had elected to go home instead of working on that day. The evidence reveals that two or three days after the commencement of the strike the respondent company commenced operations with the assistance of an employment agency which supplied replacement employees and transported them to the respondent's premises. The services of a security firm were also retained. The employment agency utilized two vans equipped for passing through picket lines and picked up the replacement labour at locations away from the plant. The pick-up locations were changed on a weekly basis apparently to prevent striking employees from interfering with the transportation arrangements. The Vesta Restaurant was a location at which a van driven by Mr. Guy Auger was to pick up two strike replacements by the names of George Turnbull and Leo McCarthy. Auger, we might add, viewed himself as an employee of the employment agency as did Turnbull.

8. Mr. Turnbull testified that he went to the Vesta Restaurant at about 6:15 a.m. on the 23rd of February to be picked up by Mr. Auger and taken into the plant across the picket lines. Mr. Turnbull met Mr. McCarthy at the restaurant and the two had something to eat. Mr. McCarthy then went outside to get his clothes from his van and Mr. Turnbull paid the restaurant bill. Mr. Turnbull testified that on leaving the restaurant at about 6:30 or 6:35 a.m., he saw a truck in front of the pick-up van, a light blue car off to one side, and another car behind the van. All of these vehicles had people in them. He testified that four persons got out of the truck in front of the van and came towards him. He testified that one of these persons was the Vice-President of the local union, Mr. Mark McCarroll, who asked where he was going. Turnbull said he responded that he was going home whereupon Mr. McCarroll

removed a knife-like tool from Mr. Turnbull's pocket, opened the blade, and stated "Maybe we should cut this guy's throat". He testified that the knife was waved in front of his face. At about the same time Mr. McCarthy came around the restaurant's corner and approached this group with his work clothes in his hands. Turnbull testified that Mark McCarroll asked McCarthy if he was with Turnbull and McCarthy replied that he was. Turnbull stated that an individual standing beside Mr. McCarroll grabbed Mr. McCarthy and threw him up against the restaurant wall. At about the same time another person on the other side of Mr. Carroll punched Mr. Turnbull in the jaw. Mr. Turnbull saw the same persons punching and kicking Mr. McCarthy. Mr. Turnbull said he ran into the restaurant and was followed by a Mr. Prewal who commenced pulling his hair and trying to drag him out of the restaurant. Mr. Turnbull escaped out of Prewal's clutches and ran out of the restaurant into a nearby field. When he returned to the restaurant he found McCarthy coming out of another field and the two went back to McCarthy's place. Turnbull then called "his boss" at the employment agency. Neither Turnbull nor McCarthy required medical attention. Turnbull had been working at the respondent company's premises since shortly after the commencement of the strike and testified that there were a number of other employees present at the restaurant who were standing about watching the incident. He, however, was able to identify only the President, the Vice-President and Mr. Prewall.

9. February 23rd, 1983 was Leo McCarthy's first day of work. He attended at the restaurant at 6:15 a.m. and the van arrived at 6:35 a.m. On returning from his own van with his work clothes he observed six or seven men in front of the restaurant and "a couple of them" talking to Mr. Turnbull. Someone asked him whether he was with Mr. Turnbull and he replied that he was. He was then told that there would be no work this day and that no one was going across the picket line. He said he was then punched in the nose and behind the ear by a person later identified to him as Larry Lutes, the Recording Secretary of the local trade union. He was also kicked by a person later identified as Dean McCarroll, the President of the local union. He, however, denied seeing anyone with a knife and at the time he was hit he was only a few feet away from Mr. Turnbull. Because it was his first work day he could not identify anyone by name. However, after speaking to Mr. Bob Dutcher who was to be his supervisor and Mr. Auger, he was able to put names to the faces he described to them. He estimated that there were approximately twelve people in the group of strikers at the restaurant that morning. And like Turnbull, he testified that other than those people who engaged in the assault, no one else did anything. Both McCarthy and Turnbull were interviewed by the police following the incident and Turnbull laid criminal charges.

10. Guy Auger testified that he was in the employ of an employment agency supplying temporary workers to the respondent company. Mr. Auger was the driver of one of the two vans that brought these workers into the respondent's plant. As noted above, the vans were specifically adapted for bringing replacement employees to work through a picket line. The windshields and headlights were protected by aluminum grills and a curtain separated the front seat of the van from the area in which the strike replacements were seated. Accordingly, it was not possible to look into the van to see who was being transported across the picket lines into work.

11. Mr. Auger testified that he changed his pick-up points every second or third day and that on this occasion there were about fifteen people in the van by the time he arrived at his last stop, the Vesta Restaurant. As he approached the restaurant driveway, two cars went by him and one of these two cars pulled behind his van. At the same time, a small truck

driven by Mr. Prewal and accompanied by Mark McCarroll drove in front of the van. The result was to block the van from moving easily. Mr. Auger testified that Bill Turnbull came out of the restaurant and all of the passengers of the truck in front of the van walked towards him. Mr. Auger instructed his passengers to put up the curtain and lock the doors. He said at that point he saw five people around Bill Turnbull and Mark McCarroll was at the van kicking it and swearing at its occupants. McCarroll also tore off the van mirrors and threatened to blow it up. One of the five persons surrounding Mr. Turnbull punched him in the head causing him to run into the restaurant. Mr. Auger testified that the strikers then turned their attention to Mr. McCarthy who had just come around the corner of the restaurant. He testified that Larry Lutes punched Mr. McCarthy in the head and Dean McCarroll proceeded to kick him. All of the other strikers he was able to identify were standing about and watching the incident. He did not see Mr. Mark McCarroll threaten Mr. Turnbull with a knife and indeed his recollection was that McCarroll was assaulting the van when Mr. Turnbull was being punched. Mr. Auger then negotiated the van out from between the two vehicles that had trapped it and left the parking lot in an effort to avoid further damage. Shortly thereafter he returned to the restaurant but Turnbull and McCarthy were nowhere in sight. He then proceeded to the respondent company's plant and arrived there at 7:05 a.m. He advised an official of the security firm of the incident and he apparently called the police.

12. Auger testified that there were more than the nine people discharged who attended the restaurant that morning. He said he was able to identify the nine because of his experience with them on the picket line for the previous six weeks. He said these were the people who gave him the toughest time. He said he came to know their names by talking to supervisors after each passage through the picket lines. He testified that Gerry Brinston was standing by the truck stationed in front of his van throughout the incident. He saw Conrad Carrier and Frank Mez also standing by the driveway. He recalled seeing Rick Blanchard standing beside the truck. He knew Blanchard's name from Blanchard having previously given him "a hard time" crossing the picket line. No physical description of Blanchard was given or of what Blanchard was wearing at the time. He recalled Surjit Prewal as the driver of the truck and standing near it when Mark McCarroll was kicking his van. He recognized Mr. Mez because of his blond hair and the fact that he had been difficult on the picket line. Mr. Mez was described as just standing by the restaurant. He also recognized Roger Richard by his bushy sideburns and glasses. He remembered Richard as having talked to the two strike replacements who Auger was trying to pick up. He pointed out that none of these persons standing about made any attempt to interfere in the assault on Messrs. Turnbull and McCarthy. On February 24th Mr. Auger and Mr. Turnbull were interviewed by Sargeant Cowling, a strike co-ordinator for the Peel Regional Police Force. The statements given to Sargeant Cowling were introduced into evidence.

13. Sargeant Cowling testified that the strike had not been a particularly eventful one. Prior to the incident at the Vesta Restaurant some ten charges had been laid and they related primarily to damage to vehicles. He confirmed that with respect to the incident he interviewed Messrs. Auger, Turnbull and McCarthy and satisfied himself that proper identification could be made notwithstanding that these persons had not worked side by side the strikers alleged to have been involved. He then advised officials of the respondent company that the following charges were to be laid: Brinston (2 counts of intimidation); Carrier (2 counts of intimidation); Mark McCarroll (weapons dangerous and assault level 2); Dean McCarroll (assault level 2); Lutes (assault level 2); Prewal (mischief and assault level 1); Mez (2 counts of intimidation); Blanchard (2 counts of intimidation); and Richard (2 counts of intimidation).

14. The respondent company was advised of these charges prior to it taking formal steps to terminate the grievors. Mr. Clayton also interviewed Mr. Auger and Mr. Turnbull to satisfy himself that proper identification had been made. Mr. Clayton said he saw the incident as involving a "commando like raid" designed to intimidate replacement employees and interfere with the company's right to continue its operation during the course of the strike. He distinguished this incident, which took place away from the picket line, from earlier picket line misconduct where charges had been laid and the company took no action. He was prepared to accept the emotion and the momentary flare-ups associated with picket-line activities but he was not prepared to accept this "concerted assault" at a location away from the plant premises. Clayton testified that he decided to dismiss those involved as soon as he was advised of the incident by the chief of security at approximately 8:45A.M. on February 23 and claimed that at that time he did not know who had been involved. Mr. William Wilson, General Manager of the respondent company, echoed Mr. Clayton's evidence. Both men agreed that in making the decision to terminate they did not give any attention to the different degrees of seriousness of the charges or to the length of service or work records of the various employees they subsequently came to believe were involved. They also agreed they were unwilling to submit any of the discharges to arbitration. They testified that they were not legally obligated to arbitrate these matters and were unwilling to shoulder the expense in doing so. When asked what if he was mistaken in his belief that certain employees had been involved, Mr. Clayton responded that "that was tough." Wilson, on the other hand, stressed that at all times the respondent company was willing to consider evidence which would establish one or more of the grievors were not present at the Vesta Restaurant. Wilson said such evidence was never forthcoming either from individual grievors or from the complainant trade union. There can be little doubt that the position of the respondent company with respect to these terminations became the major stumbling block in the negotiations from March 2nd onwards. Nevertheless, the respondent company did not relent in its view that all nine grievors had attempted to intimidate, threaten and terrorize employees from coming into work and that the resulting discharges would neither be rescinded nor submitted to arbitration. As Mr. Clayton put it, the grievors were terminated and they would remain so. The respondent company did, however, continue to negotiate with the local bargaining committee consisting of the two McCarrolls and Lutes and, as noted above, a collective agreement was eventually agreed upon.

15. Three of the nine grievors testified. They claimed and were extended the protections of the *Ontario Evidence Act*, the *Canada Evidence Act* and the *Charter of Rights*. Mr. Roger Richard had been employed by the respondent company for some six years prior to his discharge. He had been a union steward and was on the safety committee. He said he awakened at 5:45 a.m. and obtained a drive to the picket line with a person by the name of Jeff Burrows. He arrived at the picket line about 6:30 a.m. and borrowed \$20.00 from a fellow striker, Mr. Baksh, for donuts and coffees. He said he and Burrows then drove to a donut shop and returned to the picket line at approximately 6:50 or 7:00 a.m. Baksh was called to testify and confirmed that Richard and Burrows, who is a former employee of the respondent company, arrived at the picket line at about 6:30 a.m. He recalled loaning Richard \$20.00 and Richard and Burrows left. He recalled they returned at about 6:45 a.m. Richard denied going to the Vesta Restaurant at any time that morning and advised that he had pleaded not guilty to the charge against him. On cross-examination he agreed that the driver of the van would have been able to recognize him from previous sightings on the picket line given the proximity of his picketing to the driver's seat of the van. Richard testified that he did not ask the bargaining committee to advise the company that he was not there. He said he did not see what good it would do to call the company and advise Mr. Clayton that he was not present at the

restaurant because he believed he was being discriminated against for having been a strong union supporter. In his view, "If they were going through the bother of saying (I) was there, they would fight it".

16. Richard Blanchard had been employed by the respondent company for three years prior to his discharge. He had slept over in a trailer stationed at the picket line the evening of February 22nd and awakened on February 23rd at 6:00 a.m. to build a fire. He said he spoke with Farooqui Baksh and another fellow striking employee at that time. He testified that at about 6:45 a.m. he was able to get a ride to the City Center with a person by the name of Chris and then caught a bus to his home in Brampton. Chris was a fellow employee. Mr. Baksh confirmed that when he arrived at the picket line in the early hours of February 23rd, Mr. Blanchard was sleeping in the trailer. He advised Mr. Baksh that he didn't have a ride to get home. He remembered Mr. Blanchard lighting a fire at about 6:00 a.m. and at 6:15 a.m. saw him go to the washroom. He testified that he did not see him again and did not remember him leaving. He did recall seeing "Chris" that morning around 6:45 a.m. or 7:00 a.m.

17. Mark McCarroll had been employed for five years with the company prior to his dismissal. He had been Vice-President of the local union for two years and a member of the union's negotiating committee for the last two contracts. He testified there had been a rumour that some of the union's people were meeting at the Vesta Restaurant and coming into work by way of the van. Lutes, Prewal and McCarroll therefore decided that they should go to the restaurant on the morning of February 23rd to investigate the rumour and, if confirmed, to lay charges under the union's constitution against the employees involved. Prewal, Brinston and Carrier met at McCarroll's house that morning before going to the restaurant. McCarroll testified that they arrived at the restaurant at about 6:15 a.m. with Prewal pulling up in front of the van and the car in which McCarroll was riding pulling in behind. McCarroll testified that he was going towards the restaurant with Carrier but decided instead to proceed to the van. He admitted to screaming obscenities, kicking the grill and lights of the van, and breaking off the side door mirror. Auger testified McCarroll shouted that he would kill those in the van by blowing it up. He testified that he did not recall threatening to kill everyone in the van or that he would blow it up. However, he specifically denied accosting Turnbull or waving a knife in his face. He believed he was dismissed for being an active trade union supporter and recited the details of earlier events which had brought him into conflict with the company. He testified that he was constantly opposing management actions and that the management of the respondent company did not appreciate his efforts in this respect. On cross-examination, he denied that Richard and Blanchard were at the restaurant. He testified that a relatively large number of striking employees attended at the restaurant "so they would have enough witnesses". He explained that he attacked the van because someone in the van told him he had a gun and was going to "blow him away". He also said he could not tolerate being laughed at by the people in the van. He testified that he was under a lot of personal pressure from various family problems which also contributed to his actions on February 23rd. He testified that subsequently Blanchard and Richard spoke to him and asked that representations be made on their behalf to the company that they were not there at all. McCarroll said that he related this information to his brother Dean and to Ray Bowman of the parent union.

Argument

18. On behalf of the company it was argued that the Vesta Restaurant was a qualitatively different location from the plant picket line. It was submitted that the attendance of the

nine grievors at this restaurant location was a premeditated act which could only have had the purpose of intimidation. Counsel submitted that the conduct in issue could not be characterized as a momentary flare-up of emotions on a picket line, but rather was better viewed as a commando-like raid designed to coerce and intimidate persons who had a lawful right to work for the respondent company. Counsel contended that the company's reaction could not be seen as a over-reaction or as the issuance of grossly disproportionate discipline in relation to the offence. The company was concerned about the chilling effect on the replacement workers whose efforts it depended upon and its right to carry on business during the course of a strike. The company was also unwilling to concede the jurisdiction of an arbitrator to review the discharges. Counsel contended that the scheme of the Act clearly did not obligate the employer to arbitrate the terminations of the grievors, and that from the outset of negotiations the respondent company had taken the position that the collective agreement would not be retroactive. Accordingly, it was submitted that there had been no violation of sections 3, 15, 64, 66, 67(1), 70 or 75 of the *Labour Relations Act*.

19. On behalf of the union it was submitted that the company used the opportunity provided by the incident at the restaurant to rid itself of key union people and thereby to try and break the strike and the complainant trade union. Counsel submitted that the actual terminations of the grievors were all motivated by anti-union animus and contended that it was simply not believable Clayton did not know who the employees were when he made his decision to discharge. Counsel submitted that the better view of the facts is that Clayton knew precisely who the grievors were and, particularly, that the two McCarroll brothers and Lutes were involved. He therefore decided to fire everyone in order to take advantage of the situation and avoid any claim that it was singling out union officials. It was also argued that the refusal of the respondent to submit the grievors' dismissals to arbitration constituted an independent violation of the statute amounting to a refusal to recognize the trade union as the bargaining agent for these people. Finally, it was contended that the respondent company had violated section 15 by refusing to discuss the termination of the grievors particularly in light of the evidence pertaining to Blanchard and Richard wherein, in the union's view, it had been established that they were not in attendance at the restaurant.

Decision

20. Having regard to the evidence before us, we are satisfied that Larry Lutes punched Leo McCarthy and Dean McCarroll kicked him. McCarthy testified to this effect and his identification of these two grievors was assisted by company officials. Guy Auger was also close at hand and observed the assault. Neither Lutes nor Dean McCarroll testified to rebut the prima facie evidence against them. With respect to Mark McCarroll, we find on his own evidence that he attacked the van carrying the replacement employees; that he damaged the van, although the extent of the damage was not established; and that he screamed at the replacement employees. We cannot find, however, that he threatened Mr. Turnbull with a knife. While Mr. Turnbull testified that Mark McCarroll waved a knife which had previously been in Mr. Turnbull's possession and at the same time asked a threatening question, Mr. McCarthy did not see this happen. Mr. Auger testified that Mr. McCarroll was assaulting the van while Mr. Turnbull and Mr. McCarthy were being accosted. Mr. McCarroll also denied taking a knife from Mr. Turnbull and waving it in his face. The respondent company was therefore mistaken in its belief about this aspect of M. McCarroll's conduct.

21. The evidence does establish that Surjit Prewal assaulted Mr. Turnbull in the res-

restaurant. Mr. Turnbull testified to this effect and Mr. Prewal did not testify before the Board to rebut his testimony. The evidence further establishes that Mr. Brinston, Mr. Mez and Mr. Carrier were present but standing some distance from the location where the two replacement employees were assaulted.

22. Does the evidence establish the involvement of Blanchard and Richard? Both employees testified that they did not attend at the restaurant. Guy Auger purported to identify them and he would have had a very good view of them. He placed them at the truck driven by striking employees or in the driveway of the restaurant. He said he was familiar with these two employees because of their previous high visibility on the picket lines. There is no evidence, however, that these employees were previously charged with misconduct on the picket line and Auger did not describe either Richard or Blanchard or what they were wearing in any detail before this Board. Mr. Blanchard was seen on the picket line at approximately 6:15 a.m. and the employee whom he claims gave him a ride home was seen on the picket line at about 6:45 a.m. Mr. Richard was seen on the picket line at approximately 6:30 a.m. and then left with another employee to go to a restaurant. He denies that the restaurant he went to was the Vesta Restaurant. Mr. Mark McCarroll also testified that neither one of these employees attended the Vesta Restaurant. Mr. McCarroll also testified that the strikers arrived at the Vesta at approximately 6:15 a.m. It would also appear that many of the strikers assembled at McCarroll's home before going to the restaurant. Reviewing the evidence as a whole, we cannot find that Blanchard and Richard were present. The timing of the incident at the Restaurant is clearly inconsistent with Richard's involvement in that he was clearly at the picket line at approximately 6:30 a.m. The timing is, less strongly so, inconsistent with Blanchard's participation. He had been at the picket line all night and therefore would not have been aware of the plans to go to the Vesta. He was seen on the picket line at 6:15 a.m. and the person who gave him a ride home was seen in that location at 6:45 a.m. Moreover, the evidence of Charles Daniel, a security guard, and a witness called by the company did not rebut the testimonies of Blanchard and Richard. We therefore find that they did not attend at the Vesta Restaurant as alleged and that the respondent company was mistaken in this regard.

23. Before making any further findings with respect to the respondent company's conduct, we wish to discuss the applicable legal framework. We do not accept that the respondent's refusal to arbitrate the terminations constituted a failure to recognize the complainant or that section 15 was breached in this regard. This case does, however, merit a review of important issues concerning the administration of the unfair labour practice provisions of the statute. In recent years there has been a plethora of developments concerning these central provisions. Statutory adjustments have been made to legal burdens and much has been said in the cases about the role of improper motive and "mixed motive" in the commission of statutory violations. Not surprisingly, in the context of very general statutory provisions intended to provide this Board with the important role of fashioning meaningful labour relations responses to particular cases, the decision-making has evolved in a somewhat tentative fashion with the Board articulating and revising unfair labour practice policies as experience has required. Illustrative of and central to this evolution of policy is the role of motive or intent in determining whether or not key statutory prohibitions have been violated.

24. Anytime illegality is dependent on motive, an onerous burden is placed upon adjudication. The state of mind of a respondent or defendant is more difficult to establish than is misconduct or its effects. It is for this reason that the motive or intention approach has been

avoided or downplayed in many regulatory and common law fields. If motive was made a constituent element in determining breaches of contracts, for example, the goals sought to be promoted by that field of law might be impaired. The value of promises would come to be too uncertain in that successful enforcement would depend upon whether the promisor intended to default on his promise and not on the mere fact of non-performance. On the other hand, *mens rea*, motive or intent play a central role in establishing culpability in the criminal law field where the object of the law is not to compensate victims but to deter offenders. Murder is established where the offender intended to kill. General and special deterrence, the modern objectives of this area of law, require that the offender be incarcerated. However, if the offender did not intend to kill the victim (the death being accidental or the offender being insane), the incarceration of the accused will not deter either him or persons similarly situated. Incarceration would be gratuitous. But even in the criminal law field, motive is not taken to subjective extremes. If A points a loaded gun at B's abdomen, pulls the trigger, and B dies, it will be presumed A intended to kill B. Regardless that A may only have wanted to wound B, there is a presumption of intent to achieve that which almost invariably follows from one's voluntary actions. If A's conviction turned on whether he subjectively meant to kill B, the prohibition against murder would be seriously frustrated in its application and ultimately might fail to constitute an effective deterrent. Similarly, objective intent is used in those areas of contract and tort law where the state of mind of a person is a relevant consideration. For example, the law of negligence, through the doctrine of reasonable foreseeability, recognises that all losses sustained by injury cannot be compensated without frustrating otherwise useful conduct of others. Reasonable foreseeability in the assessment of contract damages also does not provide for absolute liability nor, as in tort, is it always reflective of the actual expectations of the parties. Indeed, the application of these doctrines in tort and contract on both case by case and incremental bases reveals a policy-making role of judges in extending or limiting the ambit of contract and tort law. In effect, the doctrines are judicial vehicles for balancing various conflicting interests at issue. While predictability and certainty are recognized as important legal values, the laws of negligence and contract have continued to evolve in the hands of the judiciary consistent with the needs of an increasingly complex and changing society. See Linden, *Canadian Tort Law* (1982) Chapters 5 and 10; Waddams, *The Law of Contracts* (1977) Chapter 3; and McGregor on *Damages* (1980) Chapter 6. As has been observed in another context, labour relations law is no different: See *Canada Cement Lafarge*, [1983] OLRB Rep. Feb. 214 and Adams, *Labour Law Remedies* in Swan and Swinton, *Studies in Labour Law* (1983) 55.

25. The Ontario *Labour Relations Act* regulates employer action that frustrates and impedes the formation of trade unions, the collective bargaining process and incidental employee action. At the same time the general law of employment and a market economy acknowledge the need and right of employers, for example, to set terms and conditions of employment, to hire, to terminate for cause and to lay off. To the extent that such employer actions impede the activity sought to be encouraged by the *Labour Relations Act*, some method for resolving conflict between these employer and employee rights is required. One approach might be simply to prefer one right over the other in all cases of conflict. This is not a particularly attractive option where two worthwhile but competing policies are at issue. Another option might be to balance the claimed rights on a case by case basis, examining the competing justifications and alternatives open to the parties. This approach permits an integration of competing policies but raises its own set of problems centering on the limits of administrative power. A third and for our purposes a final approach is to censure only that management action designed or intended to interfere with the exercise of statutory rights by

employees. Obviously, this option introduces motive as a constituent element in making out statutory offenses. Whether it is called motive, intent, animus, scienter, malice or mens rea, the approach makes regulation more complex while at the same time limiting its reach. And as the various fields of law discussed above reveal, an emphasis on motive does not eliminate and may only disguise the need for delicate policy accommodations by adjudicators. As we shall see, this case is illustrative.

26. A review of sections 64, 66 and 70 demonstrate that the Legislature was sensitive to these various regulatory options but, presumably because of the complex intersection of labour relations and business activity, used less than direct language in fashioning these fundamental provisions. It must, however, be kept in mind that part of the regulatory scheme includes an expert tripartite administrative agency consisting of neutral members and members representing both labour and management exercising delegated administrative discretion. The sections read:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade

union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

27. What becomes immediately apparent is the use in sections 66 and 70 of words suggesting a motive requirement whereas section 64 is expressed more in terms of effect. More specifically, section 66 uses the words "because", "seeks" and section 70 the word "seek". These words are not to be found in section 64. Instead, section 64 refers to interference. That section is also a very general one cast in terms, *inter alia*, of interference with the formation, selection or administration of a trade union. On the other hand, sections 66 and 70 are more particular in scope, aimed at particular kinds of improper action which impede or prevent persons from exercising rights under the Act. The result is that any conduct that violates sections 66 and 70 arguably will also offend section 64 but the opposite will not necessarily be so. For this reason, the inter-relationship and scope of these sections (principally sections 64 and 66) are absolutely critical. If section 64 does not require an "intent" to interfere and sections 66 and 70 do, complainants would be better off filing complaints only pursuant to section 64. The result would be, however, to read sections 66 and 70 out of the Act. This would be a dubious application of legislative intent. On the other hand, interpreting section 64 always to require motive gives little or no effect to the difference in language between the sections. This tension accounts for the somewhat different treatment accorded to section 64 in *A.A.S. Telecommunications*, [1976] OLRB Rep. Dec. 751 at p.758; *Westinghouse Canada Inc.*, [1980] OLRB Rep. April 577 at ¶54; *Rehau Plastiks of Canada Limited*, [1979] OLRB Rep. Nov. 1104 at ¶6; *Ontario Banknote Ltd.*, Board File No. 0590-80-U, unreported, dated August 15, 1980; and *Skyline Hotels*, [1980] OLRB Rep. Dec. 1811. For example in *A.A.S. Telecommunications*, *supra*, at p.758 the then Chairman of the Board contrasted the wording of section 64 [then section 56] and section 66 [then section 58] in the following terms:

30. The prohibition contained in section 56 is of a different legal character than the prohibition in section 58, the legality of employer conduct depending upon the consequences flowing from that conduct rather than upon the underlying motive. Interference with the "formation, selection, or administration" of a trade union is prohibited, such prohibition being qualified only where employer conduct falls within the accepted boundaries of freedom of expression. *In contrast with section 58, it is not necessary under section 56 to establish an anti-union animus on the part of an employer before making a finding of illegality. Conversely, the presence of anti-union animus, in the absence of any evidence of interference, would not be sufficient to found a complaint under section 56.*

31. *The essential element in any complaint under section 56 is employer interference with a trade union. A distinction must be made, however, between employer conduct that actually interferes with a trade union, and employer conduct that only incidentally affects a trade union.* The distinction, although only one of degree, is important because it takes into account the adversarial nature of collective bargaining. Given that the union and the employer are economic adversaries, the Board should not characterize the normal wear and tear of collective bargaining as constituting illegal interference. Conduct that threatens the formation or ex-

istence is quite a different matter, and would clearly amount to a contravention of section 56.

32. In this case, the respondents dismissed two employees and a supervisor, all of whom were involved in the complainant's organizing drive. Does this conduct amount to the kind of interference that is prohibited by section 56? The facts leave us with little doubt as to the answer. There is no question that the three dismissals had a chilling effect on the complainant's attempt to organize the other employees. Potts, Stockfish, Bird all testified that they believed the reason for their dismissal was their union activity. Thompson, moreover, testified that no employees were signed up after the dismissals occurred. In the circumstances of this case, it is reasonable to assume that the dismissals would be treated by the other employees as a clear message as to what would happen if they lent their support to the union. The conduct of the employer, therefore, clearly constituted the kind of interference that is prohibited by section 56.

[emphasis added]

28. To ensure that the section did not prohibit all employer initiatives impeding union activity (no matter how bona fides) the Board read into the statute an exception for employer conduct "that only incidentally affects a trade union". In this manner the Board proposed, pursuant to section 64, to distinguish between legitimate and illegitimate management initiatives. Presumably an adverse impact on union activity would be characterized as "incidental" where, relying on its expertise, the Board accepted the employer's action as classic business or collective bargaining activity not inconsistent with the scheme of the Act. In effect, the Board would "balance" the conflicting interests of labour and management, honouring accepted relationships but being vigilant that intrusions on statutory entitlements have suitable justifications. In fact, labour board analysis of no-solicitation rules has tended to follow non-motive approach after an adverse effect has been established or inferred. This is particularly apparent from the touchstone American cases which have been referred to and relied upon in Canada. See *Republic Aviation Corp.* (1945), 324 U.S. 793 and *Babcock and Wilcox Co.* (1956), 351 U.S. 105 where the relationship of section 8(a)(1) to 8(a)(2), (3), (4) and (5) of the *National Labor Relations Act* presents an identical overlap problem. See Oberer, *The Scierter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing Hostile Motive, Dogs and Tails* (1967), 52 Cornell L.Q. 489 at 509 and Christensen and Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality* (1968), 77 Yale L.J. 1269 at 1277. But see P.N. Cox, *A Re-examination of the Role of Employer Motive Under Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act* (1982), 5 U of Puget Sound L. Rev 161. See also *Barbara Jarvis and Associated Medical Services Inc.* (1961), 61 CLLC ¶16,218 at p.980; and *The Adams Mine, Cliffs of Canada Ltd.*, [1982] OLRB Rep. Dec. 1767 at 1769. *United Rubber, Cork Linoleum & Plastic Workers of America and United Rubber, Cork, Linoleum & Plastic Workers of America, Local 1028 and Michelin Tires (Canada) Limited*, [1979] 2 Can. LRBR 388 (Christie). However, we wish to stress that "the balancing" has been more one of examining the record for a legitimate management interest to support the adverse impact on union activity. It has not usually involved a delicate weighing of legitimate but conflicting interests with labour boards being the final arbiters of the right policy mix. We know of no case in Canada or the United States in which a labour board has purported to balance a bona fides exercise of a managerial prerogative, for example,

a layoff or subcontracting decision, against its impact on union activity. The no-solicitation cases have looked to identify the managerial interest in a sweeping no-solicitation rule over and above a simple reliance on property rights. Where such an interest is absent, there exists a significant imbalance in favour of the protected activity and this clear imbalance triggers a statutory violation. Indeed, this absence of a managerial interest is the same kind of a condition often justifying an inference of improper motive. The real balancing, in the no solicitation cases, has been between property rights and statutory rights. Unfortunately, this point was not made in the *A.A.S.* case which in turn gave rise to a concern within the Board itself over the viability of an unrestrained balancing approach.

29. In *Skyline Hotels Limited, supra*, the Board indicated its concern about the open-ended nature of section 64 and its potential triggering by any bona fide management action having an adverse impact on trade union activity. In contrast to the *A.A.S.* decision, the *Skyline* decision proposed to avoid this possibility by implying in section 64 a motive requirement while noting that motive need not be established always by direct evidence. In this respect the decision stated at pages 1827-28:

The striking aspect of this section is that on its face it makes no mention of anti-union motive or purpose. It simply uses the word "interfere", which, in normal parlance, could be taken to connote either intentional or unintentional conduct. As the Board commented in *Westinghouse*, [1980] OLRB Rep. April 577; [1980] 2 Can. LRBR 469 at paragraph 54; page 494:

...section 56 of the Act can be interpreted as prohibiting any employer action which has the effect of interfering with the representation of employees by a trade union regardless of whether or not an anti-union motive exists.

It would not matter, in that event, whether the employer could satisfy the Board of a legitimate business purpose for its conduct. But the Board has always had regard to industrial relations reality, and to the scheme of the Act as a whole, and has never interpreted the section in this manner. To do so would of course render meaningless the other specific provisions of the Act, such as section 58, which clearly require the finding of an anti-union motive. Any discharge of a union organizer, or perhaps of any employee during a campaign, for example, could be litigated successfully by a trade union under section 56, whether or not an anti-union motive could be shown under section 58. It is impossible to contemplate that section 56 creates that kind of unfair labour practice. As the Board commented in *Ontario Banknote Ltd.*, (Board File No. 0590-80-U unreported):

5. The union's representative argued, notwithstanding the clear evidence [of no anti-union motive] before the Board, that a discharge during a union campaign can have a chilling effect on the ability to organize. That is no doubt true. Other innocent factors, such as lay-offs for good business reasons or a financial downturn might also have a negative impact on the fortunes of a union. As real as those con-

cerns may be to a union, they are not matters which the provisions of the Act are designed to protect unions or employees against. They should, therefore, not be the basis of a complaint to this Board. (*National Automatic Vending Co. Ltd.*, 63 CLLC ¶16,278 at p.1162).

See also *Walker Brothers Quarries Limited*, [1980] OLRB Rep. July 1107, at paragraph 16. *In the absence of an anti-union motive, in other words, it is not a violation of the section if the employer's conduct simply affects the trade union in pursuit of an unrelated business purpose.* As the Board said in *A.A.S. Communications Ltd.*, [1976] OLRB Rep. Dec. 751; [1977] 2 Canadian LRBR 73 in commenting on this purposive meaning of the word "interfere".

31. The essential element in any complaint under section 56 is employer interference with a trade union. A distinction must be made, however, between employer conduct that actually interferes with a trade union, and employer conduct that only *incidentally affects* a trade union.

(emphasis added)

As has often been noted, however, the trade union will not in every case be required to prove by affirmative evidence the existence of an anti-union motive. This is so because the effect of certain types of conduct is so clearly foreseeable that an employer may be presumed to have intended the consequences of his acts: *A.A.S. Communications*, *supra*; *G. W. Martin Lumber*, [1980] OLRB Rep. May 737; [1981] 1; *Bank Canadian National (1980)*, 1 Can.LRBR 470; *Radio Officers' Union v. NLRB* (1954), 33 Can.LRRM 2417. *Once such conduct has been established, then as a practical matter (and whether or not section 79(a) of the Act applies to the situation) the onus is upon the employer to come forward with a credible business purpose to justify the conduct (cf. NLRB v. Great Dane Trailers (1967), 65 LRRM 2465).* It is up to the Board then, in all the circumstances, to decide what the motive of the employer really was.

[emphasis added]

30. In comparing this statement to the *A.A.S.* approach, emphasis must be given to the *Skyline* observation that specific evidence of intent to interfere is not an indispensable element of proof. As the United States Supreme Court explained in *Radio Officers' Union v. NLRB* (1954), 347 U.S. 17 at p.45:

Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct.

Also relevant is the fact that improper motive need not be the dominant purpose underlying disputed conduct for the Act to be breached. It is sufficient that employer conduct only be partially motivated by anti-union considerations. See the full discussion in *Westinghouse Canada Limited*, 80 CLLC ¶16,053 para's 46-56. But for recent developments in the United States see *Wright Line* (1980), 251 N.L.R.B. 1083, cert. denied (1982), 455 U.S. 989; *N.L.R.B. v Transportation Management Corp.* (1983) 113 L.R.R.M. 2857 (U.S.S.C.); Kilgore, *The Proper Test for Determining Violations in Mixed Motive Cases* (1983) 34 Lab. L. 279. Indeed, while the *Westinghouse* case involved direct evidence of motive, the combined effect of the mixed motive approach and legal inference can result in the striking down of employer conduct where the Board is not prepared to accept tendered evidence of a bona fides business purpose as a complete answer to the adverse impact on trade union activity complained of. However, usually the Board has been reluctant to find by legal inference a partial but improper motive where direct and persuasive evidence of an acceptable business justification has been established by a respondent employer. See *Webster & Horsfall (Canada) Ltd.*, [1969] OLRB Rep. Sept. 780; *Westroc Industries Ltd.*, 81 CLLC ¶16,093 and *St. Catharines General Hospital*, [1982] OLRB Rep. March 441.

31. From paragraph 30 it is therefore important to appreciate that when direct evidence of motive is not available, the Board is often required to engage in a form of balancing of conflicting interests in deciding whether to infer an improper (and possibly partial) motive on the evidence before it. Balancing is not eliminated by requiring that motive be established and this, on occasion, has caused motive to be referred to as a "fictive formality". In this respect, labour law is little different from those other fields of law discussed above. As the United States Supreme Court stated in *Erie Resistor* (1963), 373 U.S. 221 at 228-30 the necessary intent may be:

[F]ounded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out. [Citing *Radio Officers*.] But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his *dominant* purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct *does* speak for itself – it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. As is not uncommon in human experience, such situations present a complex of motives and *preferring one motive to another is in reality the far more delicate task*, reflected in part in decisions of this Court, *of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct*. This essentially is the teaching of the court's prior cases dealing with this problem and,

in our view, the Board did not depart from it.
[Some emphasis added.]

Thus the differences between the *A.A.S.* and *Skyline* decisions are not as great as may at first appear. Both approaches involve some balancing; both take into account the scheme of the Act; and, without direct evidence of motive, both approaches in effect require a considerable imbalance of interests in favour of the protected activity before a violation will be established. Unfortunately, however, it cannot be said that the requirement of motive in all claimed applications of section 64 is a superfluous detail and that both approaches always result in the same outcome. A non-motive approach to section 64, by requiring a substantial imbalance of interests, is capable of accommodating the concern that section 66 not be read out of the Act. Usually, the same imbalance will support an inference of improper motive which should negate the superiority of section 64 in the run of the mill section 89 case. On the other hand, the universal requirement of motive for section 64 can deprive the statute of the necessary flexibility to respond to certain troublesome situations which its otherwise general wording would provide.

32. For example, cases arise where employer conduct has a significant impact on protected activity and, while supported by good faith, does not reflect a persuasive or worthy business purpose. The balance between employer and employee interests may therefore strongly favour the protected activity, but the absence of a motive to interfere precludes a remedy. The no-solicitation cases are one example but not the only illustration of this problem. Indeed, the no-solicitation cases could probably be preserved on a compulsory motive test by employing a legal inference of intended interference notwithstanding the longstanding and consistent application of a no-solicitation rule without discrimination. But the problem transcends the no-solicitation cases. In *NLRB v. Burnup & Sims Inc.* (1964), 379 U.S. 21 two employees, who had been active in an attempt to organize the respondent's plant, were discharged as a result of the employer's sincere but mistaken belief that they had threatened to dynamite his plant if the organizational drive was unsuccessful. The situation was therefore somewhat analogous to the submission of the complainant in this case that, as a minimum, Blanchard and Richard were discharged because of a mistaken belief as to their presence at the restaurant. The same argument can also be made with respect to Mark McCarroll's termination to the extent it was based on his alleged threatening with Turnbull's knife. Justice Douglas for the United States Supreme Court in the *Burnup & Sims Inc.* case saw no need to decide the matter before that Court under section 8(a)(3) (the equivalent to section 66). He ruled that a discharge for alleged misconduct arising out of protected activity constituted a violation of the broader provisions of section 8(a)(1) (the equivalent to section 64) without reference to section 8(a)(3) no matter what the employer's motive when it was shown that the misconduct never in fact occurred. In adopting this position, the learned Justice wrote:

....In sum, §8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

That rule seems to us to be in conformity with the policy behind §8(a)(1). Otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false

charges would or might have a deterrent effect on other employees. Union activity often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the §8(a)(1) right that is controlling. We are not in the realm of managerial prerogatives. Rather we are concerned with the manner of soliciting union membership over which the Board has been entrusted with powers of surveillance. See *Garment Workers v. Labor Board*, 366 U.S. 731, 738-739, 48 LRRM 2251; *Labor Board v. Erie Resistor Corp.*, 373 U.S. 221, 228-229, 53 LRRM 2121. Had the alleged dynamiting threats been wholly disassociated from §7 activities quite different considerations might apply.

33. The approach is to be compared with this Board's decision in *Toronto Star Limited* (1971), OLRB Rep. Sept. 582 where an employee was discharged because the employer wrongly but in good faith believed he had intimidated and attempted to cause another employee in the respondent's mail room to sign a union card. In dismissing the complaint the Board dealt only with section 58(a) and at paragraph 13 reasoned:

On the evidence before us, we find that the respondent in this case attempted to put an end to the alleged threatening or coercive activities of Ferguson. The fact that these activities did not take place does not, in itself, make the respondent's discharge of Ferguson contrary to the Act. We are of the view that Davies sincerely believed that Ferguson had engaged in threatening or coercive activities with respect to Faver. However, had Davies made a full inquiry he would have become disabused of this belief. The fact that he did not make these inquiries is not evidence of bad faith on his part but in our view is evidence of the fact that he too was emotionally upset by the Joe G. incident and this was aggravated by Faver's complaint. While it is true that Davies acted precipitously in effecting the discharge in the manner in which he did and while such discharge was unfair and unjust, there is nothing contrary to section 58(A) of the Act with respect to the discharge. We accept the fact that Davies was motivated solely by the desire to put an end to what he believed to be threats or coercion. If Davies had acted so injudiciously in the manner in which he made the inquiries in a situation which was not aggravated by the Joe G. incident, his good faith would be cast in doubt. However, the Joe G. incident in effect panicked Davies into making the precipitous decision.

After reflecting on the relative merits of these two positions, we have come to the view that *Burnup & Sims Inc.* approach is the more appropriate position for the Board to take today. Such cases can and should be considered pursuant to section 64. The only other course open to us would be to dismiss a complaint where mistake has been established and then carefully scrutinize the employer's subsequent hiring decision when the grievor reapplies for employment. It is our view that such an approach would be too indirect and would not encourage the requisite caution that an employer should exercise when administering discipline in the context of activity protected by this Act. Accordingly, we hold that the respondent violated

section 64 of the Act in discharging R. Richard, R. Blanchard and M. McCarroll. They are to be immediately reinstated to their former positions. In the cases of Blanchard and Richard, they are to receive full back pay with interest in accordance with Board policy. McCarroll, however, is to be reinstated without back pay and on terms stated below having regard to the conduct it was established he engaged in. We will not condone such conduct with a back pay order. It is not, however, clear that he would have been terminated for only that misconduct having regard to the company's response to similar actions on the picket line. As for the argument that McCarroll would have been terminated simply for his presence at the restaurant our following findings are applicable.

34. In this case all of the grievors had been involved in picketing and strike activity which are fundamental rights under the Act. As the Board held in *Dominion Citrus and Drug Ltd.*, [1982] OLRB Rep. Dec. 1828 at 1839 lawful strike activity is protected by sections 3 and 66. Picketing, being a normal adjunct of a strike, is also protected. Did the grievors lose their protection by attending at the Vesta Restaurant and in acting in the manner that each of them did? Did the respondent violate the Act by discharging them and by refusing to arbitrate the resulting grievances? In answering these questions, we should review the way in which this collective bargaining dispute unfolded. The respondent company, concerned that the previous round of negotiations had dragged on, went on the offensive in this round. It applied for conciliation and immediately implemented its last offer as soon as it had a right to. When a strike ensued, the respondent turned forthwith to a personnel agency experienced in recruiting and transporting workers during a strike. Special vehicles and pick-up procedures screened these workers from contact with striking employees. The strike had been in progress almost two months before the incident occurred and had been preceded by earlier mischief (and the related laying of criminal charges) on the plant picket line without discipline of any kind. The use of the customized vans and external pick-up locations in time encouraged a counter strategy involving attendance of strikers at a pick-up location. The concealment of the replacements in the van may also have caused some of the strikers to suspect that a few of their own members might be crossing the picket lines. Had they merely attended at the restaurant with signs or conveyed their displeasure in traditional terms, their conduct would have fallen within the picketing contemplated by sections 76(2) and 3 and been protected by sections 64 and 66. See *Consolidated-Bathurst Packaging Limited*, [1982] OLRB Rep. Sept. 1274. The activity would have been a lawful extension of the plant picket line and not something, standing by itself, that the respondent was legally entitled to take exception to. The respondent was entitled to attempt to continue its operations but it was not entitled to immunity from any lawful counter-picketing strategy that its tactics attracted.

35. The respondent, however, contends that the manner in which the grievors attended the restaurant demonstrates that their arrival there was not a simple extension of the picket line, but rather a concerted attempt to interfere unlawfully with the pick-up and the workers involved. In this respect it relies on the numbers of striking employees involved, the way in which they blocked the van with their vehicles, and the physical assault on Mr. Turnbull and Mr. McCarthy. Counsel submits that they were discharged because they were all party to the unprovoked assaults and not for any other reason. We further note that this employer has not committed any earlier unfair labour practices and the collective bargaining relationship is not a recent one involving a first contract.

36. Subject to our comments on section 64 above, the Board is concerned with the actual motivation of the respondent in acting as it did. The Board must look beneath the stated

purposes and focus on the facts established. Like many of the difficult cases brought before this Board, there is no direct evidence that the respondent was improperly motivated. The assault on two innocent persons was unprovoked and constituted serious misconduct. It therefore cannot be said that discharge was a clearly excessive response for those who engaged in the physical assault. The respondent was also under no legal obligation to arbitrate the discharges and trade union officials who engage in misconduct have no immunity from discipline under the Act. Whether Clayton knew that D. McCarroll and L. Lutes, the president and recording secretary, were the individuals along with Prewal who carried out the assault does not and cannot change the matter. These three grievors were the authors of their own misfortune and, on the evidence before us, we are not prepared to draw an inference that discharge was selected, in part, because of their official status and because they were engaged in a strike.

37. It is important to point out in light of the earlier discussion of principle, that even a non-motive section 64 analysis of these three discharges and refusal to arbitrate would not produce a different result to this point. We have found that, given the circumstances, the decision to discharge was not clearly excessive and by itself a hallmark of anti-union animus. The decision not to arbitrate merited no different characterization. Were we to intervene on the basis of section 64, the Board would be saying that all discipline issued during a strike must be submitted to arbitration because any potential excessiveness could deter participation in protected activity. This extreme sensitivity to protected activity might well be seen as insufficiently sensitive to improper picket-line misconduct and would not obligate trade unions to take all such issues to arbitration instead of placing them on the bargaining table. It would also be difficult to reconcile our sensitivity to any adverse impact on protected activity with the absence of a legal obligation to arbitrate arising under the Act. A clear imbalance in favour of protected activity does not exist. In this type of situation it seems to us that a non-motive approach to section 64 should be reserved for instances of clear mistake or for discipline clearly out of all proportion to the misconduct in issue.

38. The discharges of Carrier, Brinston and Mez are, however, a different matter. It is clear that these employees were simply present at the restaurant. They did not engage in the assault. We have found above that their presence at the restaurant would be an aspect of protected activity (in effect an adjunct of their strike) unless their sole motivation for attending was to facilitate the assault on Turnbull and McCarthy. M. McCarroll testified that the purpose of the mission to the restaurant was to identify the strike replacements given the strategy of concealment the respondent had adopted. This rationale is a plausible one notwithstanding their manner of arrival. In any event, the respondent decided on termination before it knew of the details of the incident and at no time did it engage in an inquiry which attempted to assess the motives of Carrier, Mez and Brinston in attending. In our view, the speed and severity of the respondent's response indicated a disposition that they had "no business" being at the restaurant whatever their purpose. On the evidence before us we are prepared to infer that in expanding the circle of discharges beyond those who actually inflicted the assault, the respondent was at least in part objecting to their presence at the restaurant regardless of their motive and seizing upon a response that would make the greatest impression on other employees for the duration of the strike. Accordingly, we find that the respondent breached section 66 in dismissing these three employees. This conclusion would also apply to the Richard and Blanchard discharges. Had the respondent demonstrated to us that it was sensitive to the protected right of striking employees to attend at the restaurant unless their intent was to assault the employees, our conclusion would have been different because these three employees

did not testify to permit us to assess their actual intent. There would have been no evidence on which to find a mistaken belief and no basis for inferring an improper motive. Indeed, because these employees did not testify before the Board, we have decided to reinstate them to their former positions with no compensation. We understand that they are facing criminal trials but we are uncomfortable with their decisions not to testify. In the circumstances, our concern for what happened at the restaurant leads us to tailor a remedy for these employees which conveys that concern. No compensation is directed.

39. Finally, we turn to the dismissal of M. McCarroll which in many respects is the most difficult matter. We have found the respondent to have been mistaken with respect to the alleged knife threat but, on his own admission, McCarroll assaulted the van. Nevertheless, there is no evidence before us that at the time the company decided on the discharges it was directing its attention to anything other than the assaults on the two strike replacements. Moreover, the company had not issued any discipline in relation to earlier mischief on the picket lines at the plant. On the evidence then we are prepared to infer that M. McCarroll was, in part, terminated for just being present at the restaurant in the same manner as Brinston, Mez and Carrier or he was terminated in the mistaken belief that he had physically threatened one of the strike replacements. His termination therefore offends sections 66 and 64 of the Act. However, we are not about to condone the misconduct he did engage in or the incident as a whole by awarding him any back pay. We are, however, prepared to direct his reinstatement to his former position provided that he reimburses or makes arrangements to reimburse the company for the damage inflicted on the van driven by Auger.

40. Finally, we have concluded that the entire incident deprives the complainant of the Board's usual posting order.

41. In summary the Board declares:

- (i) that the respondent company violated sections 64, 66 and 70 of the Act in discharging R. Richard and R. Blanchard and directs that they be reinstated to their former positions with full compensation together with interest;
 - (ii) that the respondent violated sections 64, 66 and 70 of the Act in discharging F. Mez, C. Carrier and G. Brinston and directs that they be reinstated to their former positions but without compensation; and
 - (iii) that the respondent violated sections 64, 66 and 70 of the Act in discharging M. McCarroll and directs that he be reinstated to his former position without compensation and subject to the condition that he pay or make arrangements to pay for the property damage he caused on the day in question.
 - (iv) In all other respects this complaint is dismissed.
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0785-83-R William Stewart (on behalf of a group of protesting employees of K-Mart Distribution Centre), Applicant, v. Teamsters, Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent, v. **K Mart Canada Limited**, Intervener

Petition – Termination – Collectors moving around workplace freely during work hours soliciting signatures – Signatures collected at gate in view of guard – These factors combined with history of unlawful anti-union conduct by employer causing Board to find petition not voluntary

BEFORE: R. D. Howe, Vice-Chairman and Board Members J. A. Ronson and E. G. Theobald.

APPEARANCES: *William Stewart for the applicant; J. Nyman and G. O'Driscoll for the respondent; R. A. MacDermid and J. Fox for the intervener.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER E. G. THEOBALD; August 26, 1983

1. This is an application under section 57 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees of the respondent in the following bargaining unit for which it is currently the bargaining agent:

all employees of the respondent at its distribution centre in Brampton, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

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3. It is common ground among the parties that this application is timely, having been filed on July 8, 1983, during the "open period" of the September 1, 1980 to August 31, 1983 collective agreement between the respondent and the intervener.

4. In support of his application, the applicant filed with the Board a petition containing the signatures of 25 individuals, 24 of which coincide with names contained on the list of employees filed by the intervener. There were also filed with the Board in respect of this matter four statements of revocation and reaffirmation, bearing a total of 16 names, one of which coincided with the name of a person who also signed the petition. However, it was unnecessary for the Board to enquire into the voluntariness of those four documents since even if they were assumed to be entirely voluntary, that would not change the fact that the balance of the names on the petition constitute more than forty-five per cent of the employees in the bargaining unit on the date of the application. Accordingly, the Board conducted its usual inquiry into the origination and circulation of the petition, and heard the evidence and representations of the parties with respect to the voluntariness of that document.

5. The various principles, considerations, and concerns which the Board takes into account in determining whether an applicant has satisfied the onus of establishing the volun-

tariness of a termination petition are well established in the Board's jurisprudence. See, for example, *Ontario Hospital Association*, [1980] OLRB Rep. Dec. 1759, and *Upper Canada Glass*, [1981] OLRB Rep. Aug. 1181. Having regard to all the evidence and the submissions of the parties, the Board finds that the applicant has not met the onus of establishing on the balance of probabilities that the petition filed in support of this application is a voluntary expression of the views of its signatories. We have reached that conclusion for the following reasons.

6. It is a matter of public record and is common knowledge among bargaining unit employees that, over an extended period of time, the respondent employer has engaged in a series of egregious violations of the *Labour Relations Act* in respect of the bargaining unit to which this application pertains. In April of 1982, the Ontario Court of Appeal, in *R v. K-Mart Canada Limited*, 82 CLLC ¶14,185, imposed a \$100,000 fine on the intervener following its conviction for a sophisticated conspiracy designed to deny its employees the right to freely associate and organize in accordance with their rights under the *Labour Relations Act*. The unanimous judgment of that Court, written by Howland C.J.O., reads as follows:

This is an appeal by the Crown from the sentence which was imposed on June 11, 1981 of a fine of \$25,000 following the conviction of the respondent of conspiracy to effect an unlawful purpose. The charge as set forth in the indictment was as follows:

K-Mart Canada Limited, (formerly S. S. Kresge Company Limited), Michael Clarke, Max Seunik, and Verne Jenkins ... during the year 1975, at the City of Brampton, in the Judicial District of Peel, and at the Municipality of Metropolitan Toronto, in the Judicial District of York and elsewhere in the Province of Ontario, ... unlawfully did conspire together, the one with the other or others of them, and with ... (37 named, un-indicted co-conspirators) ... and with a person or persons unknown to effect an unlawful purpose, to wit: being an employer or a person acting on behalf of an employer, unlawfully agreed to interfere by means of undue influence with the formation of a trade union or the representation of employees by a trade union, with respect to the warehouse and distribution centre of K-Mart Canada Limited, (formerly S. S. Kresge Company Limited) situate at 1875 Torbram Road in the City of Brampton which conduct was prohibited by section 56 and section 85 of the *Labour Relations Act*, R.S.O. 1970, c. 232, as amended, thereby committing an offence contrary to section 423(2)(a) of the Criminal Code of Canada,

Prior to 1975, the respondent maintained a warehouse on Progress Avenue in Scarborough and Local Union No. 419 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America ("the Union") had been certified as the bargaining agent for the respondent's employees at that location.

During 1975, the respondent opened a new distribution centre in Bramalea and some employees were moved from the Scarborough warehouse to the new operation. On April 16, 1975, an application was made to the

Ontario Labour Relations Board for certification of the Union as the bargaining agent at the new distribution centre.

The respondent opposed the application and a postponement of the certification vote was granted by the Ontario Labour Relations Board on the representation that the work force of the respondent at Bramalea would be quadrupled to exceed 120 shortly after the centre opened. This representation was made under the signature of Michael Clarke as Vice-President of Personnel and Employee Relations of the respondent. In fact, there was no intention to augment the respondent's work force at Bramalea to this extent.

Centurion Investigation Limited ("Centurion") and Mark-Anada Associates Limited ("Mark-Anada") of which Daniel McGarry was the principal shareholder and officer; had agreements with the respondent to provide security and personnel services. While the application for certification was under consideration, a further agreement was made between Daniel McGarry and senior officials of the respondent whereby a number of employees of Centurion and Mark-Anada would be hired by the respondent to get information about the organizing efforts of the Union, to dissuade other employees from voting for certification, and to vote against certification themselves.

As the number of employees at the new centre did not increase, the Ontario Labour Relations Board ordered a certification vote to take place on September 19, 1975. On September 7 a strategy meeting was held, attended by Daniel McGarry, Jenkins, who was the director of security of the respondent, and Seunik, who was directing the movement of employees to the new centre in Bramalea, together with a number of employees of Centurion. At this meeting discussions took place as to the ways and means of discrediting the Union and its leaders and defeating the certification vote.

The voters' list contained the names of sixteen Centurion employees who were not *bona fide* employees of the respondent. The certification vote took place on September 18 and 19, 1975 and resulted in a tie vote of 30 votes for and 30 votes against certification. Two of the ballots cast were segregated and were further investigated.

At a hearing of the Ontario Labour Relations Board into the circumstances surrounding the certification vote, one Centurion undercover employee gave false evidence detrimental to the Union, in the presence of Michael Clarke. At a later hearing another undercover employee stated in Mr. Clark's presence that he was a *bona fide* employee of the respondent and that his connection with Centurion was innocuous.

During this period, a productivity flow analysis agreement, back-dated to April 1975, was prepared and signed by Daniel McGarry and Seunik

on behalf of the respondent to attempt to explain the influx of undercover employees into the Bramalea distribution centre.

The Ontario Labour Relations Board then directed that a further certification vote be held on January 30, 1976. Before that vote was taken the respondent had obtained new legal advice and had discharged Centurion and Mark-Anada. The second certification vote resulted in 37 votes being cast in favour of certification, and 8 votes against.

After the Union had been certified, it was unable to negotiate a contract with the respondent. A long strike ensued and finally the Union ceased to act as the bargaining agent for the respondent's employees at the Bramalea distribution centre.

The respondent expended over \$167,000 to achieve its ends in connection with the certification votes, but this sum may have included, in part, the cost of security services being provided for the respondent.

The offence with which the respondent was charged under s. 423(2)(a) of the *Criminal Code* was conspiracy to effect an unlawful purpose. The unlawful purpose was interference with the representation of employees by a trade union by means of the exercise of undue influence by an employer or a person acting on behalf of an employer. Such conduct is an offence under what is now s. 64 and s. 96 of the *Labour Relations Act*, R.S.O. 1980, c. 228 (formerly ss. 56 and 85 of *The Labour Relations Act*, R.S.O. 1970, c. 228). The maximum penalty under s. 96(1)(b) for the commission of an offence by a corporation is a fine of \$10,000. However, under s. 96(2) of the *Labour Relations Act* each day that an offence continues constitutes a separate offence. Under s. 423(2)(a) of the *Code* the maximum penalty that can be imposed is imprisonment for two years. In the case of a corporation which is convicted of an indictable offence, the fine to be imposed in lieu of imprisonment is in the discretion of the Court under s. 647(a) of the *Code*.

In determining the appropriate fine to be imposed the governing principle is that of general deterrence. The conspiracy in this case was a sophisticated one, involving a considerable degree of planning over a period of time. There was also an attempt to deceive the Ontario Labour Relations Board by false evidence. If the conspiracy had been successful it would have undermined a fundamental purpose of the *Ontario Labour Relations Act* by denying the employees of the respondent the right to freely associate and organize.

In our opinion, the fine imposed did not adequately reflect the gravity of the offence and was an error in principle. The fine must not be tantamount to a licence fee to commit illegal activity, but must be sufficiently substantial to warn others that such illegal activity will not be tolerated. We consider that a fine of \$100,000 would be appropriate in the circumstances.

Accordingly, leave to appeal is granted, the appeal is allowed, and the sentence is varied by substituting a fine of \$100,000 for the fine of \$25,000 imposed by the trial judge.

7. In February of 1980 the respondent regained bargaining rights for the intervener's employees at the Brampton distribution centre through certification by another panel of this Board (in an unreported decision dated February 20, 1980 in File No. 2062-79-R). Various events which followed that certification are recorded in *K Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421, a section 89 complaint by the present applicant and four other employees, in which the Board, differently constituted, found that, under the circumstances, the respondent did not contravene section 68 of the Act by entering into the aforementioned collective agreement with the intervener notwithstanding that the terms of settlement contained in that agreement had been rejected by a narrow majority of employees in the bargaining unit.

8. In *K Mart Canada Limited*, [1982] OLRB Rep. June 903, another panel of the Board found that the intervener had breached the collective bargaining obligation required by section 43 of the Act to be in that collective agreement, by refusing to provide the respondent with anything other than an undifferentiated lump sum cheque in respect of the union dues checked off by it pursuant to the collective agreement. The effect of that refusal, for which the intervener asserted no business justification whatever, was to leave it to the respondent to attempt to ascertain the identity of the employees to whom the dues payments should be attributed.

9. That none of the aforementioned Court and Board proceedings dissuaded the intervener from engaging in further anti-union activities in respect of the distribution centre bargaining unit is evident from the recent decision of another panel of the Board chaired by the present Vice-Chairman, in *K Mart Limited*, [1983] OLRB Rep. May 649. In that complaint under section 89 of the Act, the Board found that the intervener sought to undermine the respondent union's bargaining rights by "contracting in" substantial numbers of "temporary employees" to handle increases in warehouse work that would otherwise have been performed by employees in the bargaining unit. It also found that the intervener intentionally interfered with union representation of the grievors in that case contrary to section 64 of the Act, and that the intervener contravened sections 66 and 80(1) of the Act by refusing to continue to employ certain individuals, and by reducing the hours of work of certain other individuals, in order to penalize them for filing a grievance and because of a belief that they might testify in arbitration proceedings flowing from that grievance. To remedy those contraventions of the Act, the Board ordered the intervener to reinstate the individuals in question with compensation (including interest) and to post in conspicuous places at its distribution centre a "Notice to Employees" concerning the Board's disposition of that case.

10. While it is clearly not appropriate for the Board to visit the sins of an employer on its employees, who may have legitimate reasons for wishing to terminate the bargaining rights of a union which has been detrimentally affected by the employer's contraventions of the *Labour Relations Act*, a pattern of pervasive and notorious breaches of the Act such as that outlined above is a factor which cannot be overlooked by the Board if it is to realistically assess the voluntariness of a petition arising out of that context. To disregard that background would be to ignore the labour relations realities of the situation. However, that background is but one of several factors which have led the Board to conclude that this application should be dismissed.

11. Although the applicant appeared to be relatively candid and forthright in response to the Board's questions concerning the origination and circulation of the petition, he became quite evasive and disingenuous in responding to various questions, put to him in cross-examination by counsel for the respondent, concerning the circulation of an earlier petition, his tendency to perambulate throughout the distribution centre without challenge by management, and his relationship with Ed Prostebby, the Director of the centre. Having regard to all of the evidence and to our assessment of the relative credibility of the various witnesses who testified before us, we find that the applicant moved freely amongst the bargaining unit employees during working hours to bolster support for termination of the respondent's bargaining rights. Under the circumstances, the applicant's activities in this regard could not have failed to have been viewed by other employees as having been engaged in with the express or tacit approval of management. Furthermore, statements by at least two members of management, including Mr. Prostebby, led at least some of the employees to believe that management was being made aware of their support for or opposition to the respondent trade union. Moreover, all of the signatures on the petition filed with the Board in support of this application were obtained by the applicant at the gate to the distribution centre. The applicant obtained those signatures by stopping employees' cars by the gate as they entered the intervener's property to go to work. A security guard retained by the intervener was situated approximately ten feet away. The presence of such a guard takes on a heightened importance in the context of this case in view of the intervener's history of employing personnel provided by security and personnel services to obtain information about union activities. That such matters continue to be of concern to employees within the bargaining unit is evident from the fact that at least some of them suspected that a probationary employee who testified before the Board in respect of this matter had been hired by the intervener to infiltrate the union.

12. Thus, having regard to all the circumstances, the Board is not satisfied that the signatures in support of this termination application were gathered in circumstances which would permit employees to feel reasonably assured that management would not be made aware of which employees in the bargaining unit signed the petition and which of them did not.

13. For the foregoing reasons, the Board finds that the applicant has not met the onus of establishing on the balance of probabilities that not less than forty-five per cent of the employees of the intervener in the bargaining unit at the time the application was made have voluntarily signified in writing that they no longer wish to be represented by the respondent on July 21, 1983, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 57(3) of the Act.

14. This application is hereby dismissed.

15. The decision of Board Member J. A. Ronson will issue at a later date.

1095-81-U Frank Manoni, Complainant, v. Labourers' International Union of North America, Local 527, Nello Scipioni, and Bernardino Carrozzi, Respondents

Practice and Procedure – Trade Union – Unfair Labour Practice – Defeated candidate seeking to set aside election on basis of intimidation and coercion – Board stressing its limited jurisdiction over internal union affairs – Evidence of actual threat of physical or economic harm required to establish intimidation and coercion – Complaint dismissed

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. G. Donnelly and H. Kobryn.

APPEARANCES: *Frank Manoni on his own behalf; S. B. D. Wahl, N. Scipioni, and B. Carrozzi for the respondents.*

DECISION OF THE BOARD; August 29, 1983

1. This is the continuation of a complaint under section 89 of the *Labour Relations Act*. The Board in its interim decision of December 23, 1981 (reported [1981] OLRB Rep. Dec. 1775) dismissed the complaint insofar as it affected the complainant Lise Manoni, and also insofar as it alleged violations of sections 1(1)(p), 66(c), 68 and 80(2) of the Act. On the basis of local elections held on June 13, 1981, the complainant was replaced in his job as business manager by the respondent, Nello Scipioni, and the complainant now seeks to have the Board set aside that election. The sole basis on which the Board found that it had the jurisdiction and grounds to proceed was the alleged violation of section 70 of the Act, in conjunction with the rights guaranteed in section 3. Those sections, once again, provide:

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

2. Pursuant to the Board's ruling, hearings were held to receive the evidence pertaining to the following allegations set out in the complaint:

- (1) In September of 1980, then Vice-President Nello Scipioni attempted to physically assault the complainant.
- (2) In November of 1980, Mr. Scipioni again attempted to physically assault the complainant, and both Mr. Scipioni and Mr. Carrozzi indicated to the complainant that his life was in jeopardy.
- (3) The day before that (an allegation not considered in the interim decision), Mr. Scipioni, as chairman of the monthly membership meet-

ing, was reported to have had a wrench in his desk drawer on the stage.

- (4) In December of 1980, Mr. Botelho, while speaking in support of Mr. Manoni at the monthly membership meeting, was given a threatening gesture and told to be quiet by a member seated on the "Scipioni" side of the audience.
- (5) In March of 1981, Mr. Scipioni attempted to physically assault the complainant in the presence of the general body of the membership.
- (6) In May of 1981, Mr. Drolet was expressing his opinion on matters relating to the administration of the Local Union, when Mr. Scipioni told Mr. Drolet that he would see to it that Mr. Drolet lost his membership with the union and his job.
- (7) At the election on June 13, 1981, the judges of the Local's elections refused to permit the appointed "watchers" (i.e., scrutineers) to fulfill their functions under the constitution. The judges were directed by Mr. Bernardino Carrozzi to order the watchers away from the polling area.

It is the cumulative effect of these events, and particularly how the impugned events on the day of election itself may have been influenced by these prior events, that is the issue before the Board.

3. Local 527 was organized in the late 1950's by Frank Manoni himself. Mr. Manoni was its first business representative and, when the name of the office changed, its first Business Manager as well. Until the events now in question Mr. Manoni was, in fact, its only Business Manager, and he had never before June of 1981 faced opposition in the Local's elections. Nello Scipioni and Bernardino Carrozzi were brought into the Local by Mr. Manoni, and both men held staff positions under him for a number of years. The relationship between the three men had always been, as Mr. Manoni described it, "wonderful".

4. All of that changed in August of 1980. Both Scipioni and Carrozzi were at that time business representatives, and Mr. Scipioni was the elected Vice-President of the Local as well. Charges of mismanagement were laid against Mr. Manoni, ostensibly by the Local's President, Jacques St. Croix, and a Trial Board was set up under the Local Constitution. Mr. Scipioni was named chairman of the Trial Board, and the other members of the Board were appointed by him. Mr. Carrozzi acted as Recording Secretary. The hearing took place on August 28th, and Mr. Manoni was found guilty. As a penalty, the Trial Board fined him \$20,000 and barred him from holding any office in the Local Union for 20 years. Mr. Scipioni purported to assume the role of Business Manager *pro tem*, and was formally appointed to the position by the Local Executive Board on September 22, 1980. It appears that the International intervened to roll back this appointment, but it is apparent from the evidence that Mr. Manoni from this time forward ceased to enjoy his normal authority as Business Manager. In March of 1981 Mr. Manoni tried unsuccessfully to terminate Messrs. Scipioni, Carrozzi and St. Croix as business representatives, and later in that month Mr. Carrozzi supervised the laying of further charges against Mr. Manoni. Throughout this period the Local had clearly be-

come polarized into two camps (those supporting Manoni versus those supporting Scipioni), and the affairs of the Local were characterized by confusion and acrimony. All of this served as a prelude to the election of June 1981.

5. The conduct of the election itself raised ample cause for concern on the part of the defeated candidate, Mr. Manoni. The three persons named as judges were Jose Martens, Rodolphe Chenier and Carlo Moscardi, but it is clear that Mr. Moscardi assumed the role of chief judge and took the initiative in carrying out all of the steps both prior to and during the election. Mr. Moscardi was one of the members appointed by Mr. Scipioni to serve as a judge in Mr. Manoni's Trial Board hearing of August of 1980, and he was also one of three signatories to the charges laid against Mr. Manoni in March of 1981. Mr. Moscardi, in addition, comes from the same village in Italy as Mr. Scipioni, and is an officer in the same Italian social club of which Mr. Carrozzi is the President. It was Mr. Moscardi who, through Mr. Carrozzi, obtained the ballots for the election, and who otherwise took the lead in carrying out the steps of the election.

6. It appears that roughly 350 members cast their ballots on election day. The judges did not emerge with the results for some 9 hours after the polls were closed, while the members waiting in the parking lot pondered the reasons for the delay, and attempted to catch glimpses through the meeting hall windows. The procedure adopted by the judges throughout the election, including the count, was to have the candidates' "watchers" (or scrutineers) sit some 10 feet from the judges' table, with the result that the watchers were not able to verify the ballots as each one was counted; the judges simply compared their tally sheets at the end and announced a final tally for all candidates when the counting had been completed. The tally sheets, the used and unused ballots, and other material of the election were then placed in a ballot box which was locked with two locks. This, according to Mr. Chenier, included at least one ballot which the judges had rejected as a photocopy. There were, apparently, also a number of smaller photocopied ballots being circulated by Scipioni supporters as campaign material prior to the election, but it does not appear that any of these found their way into the ballot box. Mr. Moscardi kept a key to one of the locks, and Mr. Chenier a key to the other. The judges testified that the box was taken by Mr. Moscardi to his home, and that a couple of days later all three judges attended at Moscardi's home to wrap and tape the ballots. The package of ballots was then delivered to the Local union and to its Ottawa solicitor for safekeeping. Midway through the Board hearings, the respondents tendered the package of ballots as a complete answer to the complainant's claim that he had been wrongfully deprived of office. The Board, however, alerted the respondents to the difficulty the Board had in accepting such evidence as conclusive in all of the circumstances, and the respondents did not press that position in argument. One further point reflecting on the overall credibility of Mr. Moscardi before the Board is that a dinner obviously for the Scipioni/Carrozzi faction took place with Messrs. Scipioni and Carrozzi at the Capri Restaurant immediately following the announcement of the election results on June 13, and Mr. Moscardi was there. When this was put to Mr. Moscardi himself on cross-examination, he admitted to being at the restaurant that night, but was, he said, unable to recall whether Messrs. Scipioni or Carrozzi had been in attendance. Given the results of the election and the timing of this dinner, the Board finds this lack of recollection difficult to believe.

7. The complainant on the strength of his allegations asks for:

- (1) restoration of himself as Business Manager, with full compensation for all time lost;
- (2) a new election;
- (3) an order for the respondents to cease and desist in all intimidation and coercion.

8. The complainant has, however, distanced himself somewhat from the Local since the time that this complaint was filed. He has, for example, assisted a group of his former supporters in Local 527 to form a new trade union called the Labourers' Union of Canada. That union was formed to organize construction labourers in general, placing it in direct competition with Local 527. The only application for certification which turned out to be a "raid" on Local 527, however, has in fact been withdrawn. In addition, however, the complainant himself was encountering difficulty in acquiring new employment within his field, and in November of 1981 finally accepted an offer from the Carpenters' Union to join their international staff. After a series of denials, the complainant finally conceded what was readily apparent: i.e., that it was understood that he would be organizing Local 527's members on behalf of the Carpenters'. Mr. Manoni then went on to emphasize how easy it had been for him to do so, stating that he had been able to file seven displacement applications for certification in his first 15 days on the job. This evidence focused attention on the question of the relief still being sought by the complainant, and the complainant, after consultation with counsel, indicated no change in the relief as originally requested. He was then asked by his counsel whether, if the Board were to order a new election for Business Manager of Local 527, the complainant would participate. Mr. Manoni responded that that was a difficult question to answer: he stated that his heart had always been with the Labourers' Union, but that he now had responsibilities to his new employer. After a pause Mr. Manoni stated that he would run in a new election if his new employer would permit him to do so, on the basis that he would take the job in Local 527 if he won.

9. In viewing the merits of the complaint, the bulk of the facts particularized by the complainant were hotly contested, and the evidence was characterized by witnesses highly conflicting in their testimony. In resolving the many issues of credibility necessary to a finding of the facts in this case, the Board has had regard to the interest at stake of the witnesses in question, their apparent relationship to the major protagonists, and to the overall manner in which they gave their evidence. Apart from the various members of this Local who testified, it might be noted that the respondent summonsed two representatives of the International as well, but the Board did not find their evidence to be of assistance. Based on its assessment of the witnesses, the Board makes the following findings of fact with respect to the various events referred to in the complaint.

10. Beginning with the critical event first, the evidence establishes that the watchers present on the day of the election, June 13, 1981, were not permitted to actually "watch" the counting of the ballots. Having regard in particular to the testimony of Mr. Stephano Paoletti and Mr. Arthur Cossette, being the two watchers who appeared to have the least direct interest in the proceedings, we find that the watchers were directed by the judges during the counting to remain seated in their chairs, which were some 8 to 10 feet distant from the table at which the judges were working. There were, it would appear, times at which various of the watchers stood by the table while the judges were counting, but according to Mr. Cossette,

this invariably led to arguments and the watchers being told to leave the judges alone and return to their chairs. The judges stated that it was *their* job and not the watchers' to do the counting, and the watchers were not to interfere. Mr. Cossette did not purport to understand all of the arguments that went on, because they were largely in Italian (which he does not speak), but he testified that at one point, when all of the watchers were gathered around the judges' table, arguing and shouting, one of the judges said that if the watchers did not quiet down and return to their chairs, they would stop the counting right there. Mr. Cossette testified that all the watchers then returned to their chairs, and did not protest further. The evidence of watcher Avio Manoni, the brother of Frank Manoni, was that he was told by the judges if he did not like the way that the counting was being done, he could go home.

11. A further issue in the complaint is whether this instruction to the watchers to remain back from the judges' table was made pursuant to a direction issued to the judges by Bernardino Carrozzi. The evidence does establish that, *during the voting*, some of the watchers were accosting voters as they left the room, asking them how they voted, and that Mr. Carrozzi came into the room and told the judges to have the watchers keep away from the voters. Mr. Carrozzi's only contribution *after* the counting began, however, appears to have been to enter the room where the judges and watchers were sitting and offer to get any of them a coffee. The only watcher testifying that Mr. Carrozzi issued any instructions to the judges after the point when the polls had closed was Avio Manoni, and in light of the evidence of other less interested watchers, the Board does not accept his evidence.

12. The fact remains, however, that under the procedure adopted by the judges, the judges took upon themselves the sole task of counting the individual ballots, and the "watchers" of the candidates were not extended the opportunity to participate in and otherwise verify the actual counting of the ballots. This, as the complainant maintains, would appear to be inconsistent with the procedure contemplated by the Local Union's constitution, which provides:

Section 3. ELECTION.

(a) The voting area shall be located in a hall or room where all of the functions of the election process will be open and visible at all times, to the Watchers and the election officials charged with the proper conduct of the election.

(b) Each candidate may, at his own expense, designate in writing, a Watcher, who must be a member of the Local Union and who must, no later than the day of election, deposit such written appointment with the Judges of Election.

• • • •

(i) When the closing time as prescribed has arrived and all voters present have voted, the Secretary-Treasurer, having fulfilled his duties during the election, shall leave the voting area. The Judges of Election shall take possession of the ballot box, in the case where paper ballots are used, or open the voting machine, if machines are used, and proceed to count

and tally the vote for each office or elective position, in the presence of the Watchers...

But even if the procedure was "irregular", do the actions complained of constitute "intimidation" or "coercion" within the meaning of section 70 of the *Labour Relations Act*? To make them so, the complainant relies upon the cumulative effect of the other events particularized in his complaint.

13. The first of these occurred on September 2, 1980. The allegation is that at the Executive Board meeting of this date, Mr. Scipioni attempted to physically assault the complainant, and threatened his life. The Board would not, however, put that interpretation on the evidence that it heard. That was a meeting chaired by Mr. Forgie, sent by the International immediately following the purported ouster of Mr. Manoni at the hands of the Trial Board on August 28th. The meeting was obviously highly contentious and agitated, and we find that Mr. Scipioni did in the course of the argument "jump across the table" at Mr. Manoni on at least one occasion. The table across which the two men were seated was some 5 to 6 feet across, however, and we find the actions of Mr. Scipioni in "jumping across the table" were reflective of the intense volatility of the meeting, rather than a real attempt to lay his hands on Mr. Manoni. The main topic of discussion was, as well, Mr. Manoni's insistence that, in spite of the Trial Board's purported ouster, Mr. Manoni still held the reigns of power. At one point Mr. Scipioni looked at the complainant and said: "Franco, se morto" (Frank, you're dead"). The complainant asked Mr. Scipioni what he meant, and Mr. Scipioni smiled and drew a large question mark in the air. The Board views Mr. Scipioni's comment entirely in the context of the issue being discussed; that is, as a comment by Mr. Scipioni that Mr. Manoni's career as Business Manager in charge of the Local was over.

14. The next occasion referred to in the complaint was a November 21st encounter on the stairs outside the union hall. This was the day after another of the Local's stormy membership meetings, in which once again the major topic had been the conviction of Mr. Manoni by the August 28th Trial Board, and the insistence by Mr. Manoni that the charges and conviction were without foundation. An issue arose as well over Mr. Manoni's exclusive use of his secretary. Mr. Manoni on the day after the meeting attended at the union hall and delivered some material upstairs to Percy Kent, the Secretary-Treasurer of the Local. Mr. Scipioni and Mr. Carrozzi were present as well. The latter two indicated to Mr. Manoni that he had caused a great deal of trouble the night before, and, had the two of them not intervened, the members would have killed him. The Board does not find on the evidence that this could in any way be interpreted as a threat on behalf of Messrs. Scipioni and Carrozzi themselves. Mr. Manoni then left his material with Mr. Kent and proceeded down the stairs inside the union hall on his way out of the hall to the parking lot. Mr. Scipioni suddenly came bounding down the stairs after him, and cornered Mr. Manoni on the verandah outside the hall. Mr. Scipioni, in a very agitated manner, held two fingers in front of Mr. Manoni's eyes, and said in Italian: "I'm going to strangle you". Mr. Carrozzi was also on the verandah at this point, behind Mr. Scipioni. Mr. Scipioni neither said nor did any more, and Mr. Manoni was permitted to withdraw to the parking lot. The Board does not know what it was that so enraged Mr. Scipioni on this occasion, but the incident, in any event, ended without physical contact, and Mr. Scipioni made no effort to carry out his angry threat.

15. It was also on this day following the November 20th meeting that the presence of the wrench in a desk drawer at the union hall came to Mr. Manoni's attention. Mr. Manoni

telephoned Mr. Kent that day and, without Mr. Kent's knowledge, proceeded to tape the conversation. Mr. Kent had been a co-accused with Mr. Manoni in the Trial Board proceedings, and Mr. Manoni in this telephone call persistently prodded Mr. Kent to tell him what he knew about the insurgents' capacity for violence. Mr. Kent confided to Mr. Manoni that while on stage at the meeting the night before, he had noticed a wrench in the desk drawer beside the chairman, Mr. Scipioni. He said he later saw Mr. Scipioni remove the wrench and put it in his car. Mr. Kent then went on to express a general concern for Mr. Manoni's safety. Mr. Kent did not, however, provide in that conversation any specific basis for his concern, although repeatedly pressed by Mr. Manoni to do so. As a witness, Mr. Kent clearly was not pleased with Mr. Manoni having taped him in this manner, and, after seeking legal counsel, went no further than to acknowledge that the taped conversation had taken place.

16. The evidence is that the two rival factions took up opposite sides of the room at membership meetings during this period, and generally hooted and hollered when the other side was trying to speak. While the chairman, be it Mr. Scipioni or the President, Mr. St. Croix, may have ruled in a less than even-handed manner on these occasions, the evidence of Mr. Batiste, a steadfast supporter of Mr. Manoni, indicates that it was more the interference from the members on the opposite side of the hall which prevented people from speaking than the rulings from the chair. The evidence establishes, in fact, that the interference was occurring from *both* sides, but was becoming more effective from the "Scipioni" side because, as the complainant himself acknowledges, whatever the reason, the number of members choosing to sit on the "Manoni" side of the hall was gradually shrinking.

17. The next specific event occurred at the general membership meeting of December 1980. As usual, the continuing status of Mr. Manoni as Business Manager was the overriding issue at the meeting, and one of Mr. Manoni's Portuguese supporters, Jean-Louis Botelho, stood up and called: "Who is for Manoni"? This, predictably, provoked total disorder throughout the audience. One member in particular, seated opposite Mr. Botelho on the "Scipioni" side, told him to sit down and shut up. Mr. Botelho glared at this man, and the man pulled open the side of his jacket and pointed to the inside pocket. This, we were advised by the Portuguese interpreter, is a threatening gesture meant to suggest the presence of a knife or similar object. Mr. Botelho, it would appear, was unimpressed by the other man's action, and told the man in Portuguese to (translated literally) "put it under his tail". From the interpreter's embarrassment, it would appear that the English equivalent to this expression is not very different.

18. A further incident occurred at the general membership meeting of March 17, 1981. Mr. Andre Roy, Mr. Manoni's brother-in-law, had been a business representative in the Local until he and Mr. Manoni had a permanent falling-out in 1978. Mr. Roy was approached by Mr. Scipioni in March of 1981 and invited to re-enter the affairs of the union. Subsequently, Mr. Roy says he received anonymously in a brown envelope a package of invoices designed to show that Mr. Kent as Secretary-Treasurer had been abusing his Local Union credit card for personal use. Mr. Roy presented this material and accused Mr. Kent in front of the membership at its meeting of March 17th. Mr. Manoni at that point was sitting on the stage beside Mr. Kent, but as Mr. Roy began to explain his charge, Mr. Manoni moved off the stage and took a seat in the front row of the audience. As the discussion began to heat up, Mr. Manoni turned and began to exit up the aisle-way of the hall. Mr. Kent called Mr. Manoni to come back and face the charge with him and then ran up the aisle after Mr. Manoni, dragging him by the collar to the front of the stage. At this point the meeting fell into total disorder, and

the members crowded forward to separate Mr. Kent and Mr. Manoni. Mr. Kent accused Mr. Manoni of supplying his brother-in-law, Mr. Roy, with the invoices. Mr. Manoni denied that he was responsible, and, pointing to Messrs. Scipioni and Carrozzi, said: "Ask them". Mr. Scipioni had been seated at the far end of the stage next to Mr. Carrozzi, and the evidence of Germaine Picard is that Mr. Scipioni came running at Mr. Manoni with his hand raised to strike Mr. Manoni, when Mr. Picard interceded to restrain him. Mr. Picard is another long-time follower of Mr. Manoni, but the Board nevertheless finds his evidence more credible than that of anyone else who testified on this point. The Board accordingly finds that this attempted attack by Mr. Scipioni did take place.

19. The final incident in the complaint took place at a meeting in Hull approximately two weeks prior to the election. It was a meeting called by Mr. Roy to promote the candidacy of Mr. Scipioni. Mr. Drolet, at that time a supporter of Mr. Manoni, decided to attend the meeting on the basis that Mr. Batiste would too. When Mr. Drolet arrived, however, Mr. Batiste was not there. The meeting was discussing charges and certain reports alleged to show mismanagement on the part of Mr. Manoni. Mr. Drolet testified that when he entered the room, everyone ceased talking, and looked at him. He says that he did not feel welcome, but that he was allowed to view the material, and ask any question that he wanted. Mr. Drolet by the date of his testimony appeared to have changed sides, and the Board specifically ruled that it could place no weight on his evidence. It suffices to say that his evidence did not make out the complainant's allegation that Mr. Scipioni threatened Mr. Drolet with the loss of his membership and job, and the complainant called no other evidence on the point. Mr. Drolet says that what Mr. Scipioni said was that anyone who makes trouble for the Local (meaning Mr. Manoni) was subject to being charged under the constitution.

20. These are the facts upon which the complainant relies. There were also allegations of anonymous and threatening phone calls made to Mr. Manoni and his family during this unfortunate period. The Board ruled, however, that there was no evidence to connect these unsavoury acts to any of the respondents, and that they therefore lacked probative value for the purpose of the present inquiry.

21. In the Board's view, the facts in this case do not make out a pattern of conduct which would support a finding that any of the named respondents interfered with the June 13th election through "intimidation" or "coercion". The *Labour Relations Act* exists primarily for the purpose of regulating collective bargaining between organizations of employees and employers; the Board's supervision of *wholly* internal affairs of a trade union (i.e., alleged misconduct falling even outside the representational parameters of sections 68 and 69 of the Act) arises no more than tangentially to this main purpose. In our view, for the purposes of the Board's jurisdiction to oversee such internal trade union affairs, the words "intimidation" or "coercion" require an actual threat of physical or economic harm. Compare and contrast, e.g., the *S. A. Greco* case, [1976] OLRB Rep. June 323, referred to by the Board in its interim decision in this matter. The actions of the judges at the election, standing alone, clearly do not meet that criterion. Nor has there been a pattern of conduct established which would cause the judges' actions to be perceived by the "watchers" as a threat of physical or economic harm. Whatever may have been the perceived connection between the judges and Messrs. Scipioni and Carrozzi, there simply is no pattern of conduct made out which make it a reasonable likelihood that the watchers feared physical or economic harm if they disobeyed the directives of the judges. The conduct of Mr. Scipioni, such as it was, at the Executive Board meeting of September 2nd and on the verandah on November 21st, was not done

in the face of any of the general membership or subsequent "watchers". Similarly, the presence of the wrench in the drawer, for whatever purpose, was known only to Mr. Kent and, after the fact, to Mr. Manoni. The incident between Mr. Botelho and the man who gestured to his pocket was, on the evidence, witnessed by very few, and Mr. Botelho himself clearly did not find it to be intimidating. In addition, that incident bore more the stamp of the inter-member "fights" the Board heard occurred with considerable frequency during these meetings, than it did of anything attributable to the instigation of Mr. Scipioni or Mr. Carrozzi. The attempted attack by Mr. Scipioni on Mr. Manoni at the March 17th meeting occurred when the meeting was already in a tumult, at a time when the main attraction was taking place in a scuffle between Mr. Manoni and Mr. Kent, and the reaction of Mr. Scipioni does not appear from the evidence to have been a significant event to the members present at the time.

22. The complainant was cautioned (twice) in the Board's interim decision that the Board's jurisdiction in internal trade union matters was a limited one. The Board expressly rejected the complainant's argument of a broad supervisory jurisdiction based on such decisions of the Courts as *Howard v. Parrinton*, [1971] 3O.R. 659 (S.C.O.). Yet the complainant again in his closing submission made reference to the broad supervisory authority of the Courts, specifically citing *Howard v. Parrinton* once again.

23. The Board does not have an inherent kind of supervisory jurisdiction such as that discussed in *Howard v. Parrinton, supra*. It has, as it has said, a jurisdiction limited to "intimidation" and "coercion" when it comes to wholly internal affairs of a trade union. Matters of irregularity or improper conduct beyond that fall to be dealt with either politically or through the internal procedures provided by the organization's governing laws, or, failing that, through resort to a Court of competent jurisdiction. While proceedings before the Labour Board may have an appeal as to cost and (sometimes) speed, the offsetting limitations on the Board's own jurisdiction must be considered as well.

24. On the facts found by the Board in this case, the complaint must be dismissed.

0807-83-U; 0808-83-U The Mill Dining Lounge, Applicant, v. Hotels, Clubs, Restaurants and Taverns Employee Union, Local 261, F. Grilla, Secretary Treasurer and Business Agent, Eleanor S. Dunn, A. Charron, John Simpson, Lawrence Carter, Rad Daher, Claude Borda, Fernando Cagial, Stan Elliott, Carlo Vial, Pierre Hardy, Kathleen Kennedy, Tom Hughes, Roberto Rei, Oscar Borda, v. Respondents

Strike – Employees not scheduled to work participating in picketing – No employee failing to perform shift scheduled – Not “strike” within meaning of Act

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: *James B. Chadwick, Murray Macy and Walter Langley for the applicant; David J. Jewitt, Frank Grella, Eleanor Dunn and Frank Charron for the respondents.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; August 18, 1983

1. These applications for a consent to prosecute and a cease-and-desist direction arise out of the picketing by the respondents of the applicant's premises on June 13, 1983. No employees of the applicant failed to perform their scheduled shifts, and the applications were dismissed orally at the hearing on the basis that the evidence did not satisfy the Board that a “strike”, within the meaning of the *Labour Relations Act*, had occurred.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. I agree with the majority in their finding that the evidence with respect to the failure of Carlo Vial to work as requested was equivocal and that union leadership appear to have been scrupulous in ensuring that only employees who were not scheduled for work at the time participated in the picketing.

2. I do however prefer the argument advanced by counsel for the applicant as to how the Board should interpret section 1(1)(o) wherein a “strike” is defined as including “a slow-down or other concerted activity on the part of employees *designed to restrict or limit output*” (my emphasis added).

3. Clearly, the activity was designed to injure the employer by dissuading the public from patronizing the restaurant. That they were successful in doing so is confirmed by the uncontradicted evidence that business was down by approximately 15% from the norm which would have been anticipated that day.

4. It should be acknowledged that this reduced level of business activity would also have had the effect of reducing gratuities, the principal source of income, for their co-workers who were on duty. While the *Labour Relations Act* does not make it an offence for employees to shoot themselves in the foot, inadvertently or otherwise, neither could it be argued, nor was it, that their suffering legitimizes the damage they incurred on their employer.

5. Counsel for the respondent suggest, in view of the Board's past practice in its inter-

pretation of the strike definition, that the applicant should seek relief in another forum. How this suggestion, if acted upon, would serve to improve a labour relations climate in which the parties already seem intent upon winning debating points rather than furthering harmonious relations is not merely unclear but unworthy.

6. I would have granted the requested order if only to indicate to the parties that if they insist on treating collective bargaining as a class struggle race to nowhere, the probability is that they will succeed in getting nowhere.

1092-83-U Angelo Moro, Complainant, v. Operative Plasterers and Cement Masons Local 598, Respondent

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Unfair Representation complaint seeking inquiry into irregularities in union pension fund – Duty concerning union representation of employees vis-a-vis employer – Not applicable to internal union matters – Dismissed without hearing for absence of prima facie case

BEFORE: George W. Adams, Q.C., Chairman.

DECISION OF THE BOARD; August 26, 1983

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging that the grievor has been dealt with by the respondent contrary to the provisions of section 68 of the *Labour Relations Act*, and requests that “records be examined from 1957 to 1980 to see if there ever was a pension fund established, or voted upon to be established, from the regular monthly dues deductions in Local 117, which was merged into Local 598 in 1980, and whether any union deductions were used to supplement the Canada Pension Plan before and after its inception”.

2. Section 68 reads as follows,

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or any constituent union of the council of trade unions, as the case may be.

3. The misconduct that the complainant has alleged concerns a dispute between himself and his union regarding the union’s pension fund. It would appear that the complainant is not challenging the quality of the respondent’s representation vis a vis his employer, but rather is asking the Board to concern itself with a matter that is solely an internal union problem. The complainant is in essence asking the Board to intervene to determine the existence, or lack thereof, of a union pension plan. Such an undertaking would involve the Board in

matters of concern that exist between the union and the complainant, and would have nothing to do with the quality of representation with respect to his employment relationship. The Board has consistently ruled in past decisions, that the duty of fair representation in section 68 is concerned only with the representation by a trade union of an employee in relation to his or her employer. See *Ford Motor Company*, [1973] O.L.R.B. Rep. Oct. 519; *Myrna Wood*, [1981] O.L.R.B. Rep. 137; *Frank Manoni*, [1981] O.L.R.B. Rep. Dec. 1775; *Sylvia Colallicco*, [1982] O.L.R.B. Rep. July 1066. Simply put, these cases have established that section 68 does not give the Board jurisdiction to intervene in internal union problems. The Board stated in *Mario Moreira*, [1980] O.L.R.B. Rep. July 1039:

This Board has no specific authority under the Act to undertake any sort of watchdog role over a union's internal processes under its constitution and bylaws.

4. In the circumstances, the Board is of the opinion that the applicant has failed to make out a *prima facie* case for a breach of section 68 of the *Labour Relations Act*. Section 71(1) of the Board's Rules of Procedure is as follows:

71d.-(1) Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

5. The Board is of the opinion that this complaint must be dismissed pursuant to the above provision and hereby does so.

0748-82-U Hotel, Restaurant & Cafeteria Employees Union, Local 75, Complainant, v. Movel Restaurants Limited, c.o.b. as Movenpick Restaurants of Switzerland, Respondent

Damages – Unfair Labour Practices – Whether original decision disposed of extent of compensation – Whether lost gratuities part of damages for lost “wages” – Board ruling gratuities compensable to make whole remedy

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

APPEARANCES: *A. Ryder, Q.C. and G. Pineo for the complainant; Owen V. Gray and Jorg Reichert for the respondent.*

DECISION OF THE BOARD; August 12, 1983

1. This matter came on for hearing because the parties were unable to agree on the damages payable as a result of the Board's decision dated December 10, 1982 (unreported).

In that decision the Board found that the respondent had breached sections 64, 66(a), 66(b), 66(c) and 70 of the *Labour Relations Act*. The Board gave the following orders and directions:

21. The parties agreed that the question of compensation should be determined at a later date in the event that the Board found liability on the part of the respondent. The Board directs the respondent to reinstate the grievors with compensation for lost wages and interest thereon. The Board remains seized with this complaint with respect to any issue arising out of its implementation.

22. The Board orders that the respondent post copies of the attached notice marked "Appendix", after being duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced, or covered by any other material. Reasonable physical access to the project shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this requirement of posting is being complied with.

2. The issues which separate the parties are numerous. Due to the lengthy nature of the evidence, we decided to hear argument on and determine one of these issues as a preliminary matter. We, therefore, were not seized of the remaining issues which will be dealt with by another panel.

3. The issue to be decided by us is whether the amount equivalent to gratuities which the individual grievors received from customers should be considered as part of the amount the respondent ought to pay to the grievors between their termination and reinstatement by Board order. This issue has two parts:

1. whether the previous panel in ordering reinstatement "with compensation for lost wages" effectively dealt with the issue of compensation and thereby excluded gratuities; or
2. whether, if the previous panel did not deal with the issue of compensation and did not restrict it to wages (i.e. payments from the respondent), gratuities should be considered a part of "compensation".

It was our unanimous ruling that the issue of compensation was not fully dealt with by the previous panel. It was undisputed as between counsel that no argument as to whether the compensatory order of the Board should or should not include gratuities was made before the previous panel. This fact has led us to conclude that the Board essentially reserved the whole question of compensation to be dealt with if the parties could not themselves resolve it and the reference to "wages" was not intended to eliminate gratuities. That being the case, we heard argument on whether the respondent ought to be ordered to pay gratuities, which the grievors foreseeably could have received if their employment had not been wrongfully terminated.

4. The complainant argued that the seven grievors who were terminated ought to be placed in the same monetary position, as they would have been if no wrong had been committed. Section 89's remedial reach is at least long enough to embrace this principle of contract law. At least two decisions of this Board prove that it does: *Mister Leonard Ltd.*, [1975] OLRB Rep. Aug. 629 at paragraph 5 and *Hallowell House*, [1980] OLRB Rep. Jan. 35. Both stand for the proposition that the remedial intention of section 89 was to make a grievor economically whole and restore economic loss directly attributable to the respondent's wrongdoing. The interest payment required by *Hallowell House* is in accord with this principle. A direction to pay gratuities lost is, as well. Although neither this Board nor an arbitration board has considered the argument of whether gratuities ought to be a part of the assessment of compensation, the courts have dealt with the issue in the context of an action for wrongful dismissal. In *Manubens v. Leon*, (1919) 1 K.B. 208, Lush, J. awarded a hairdresser's assistant, who had been wrongfully dismissed, wages in lieu of notice and an amount in respect to the loss of gratuities he would have received if he had been given proper notice. The reasoning of the court is as follows (p. 210-211):

...The defendant, however, refused to recognise as an item of the plaintiff's claim to damages any claim in respect of the loss of the tips which he would have received if he had been permitted to continue in the defendant's service under a proper notice. ...In my opinion the view which he took was wrong. The plaintiff was entitled, upon the defendant's breach of the contract, to recover for the loss he had sustained by reason of the breach, the loss being measured by, or represented by, the damages flowing from the breach within the contemplation of the parties to the contract. It was clearly within the contemplation of the parties to the contract that the plaintiff would receive these tips.

The complainant argued that the rationale behind a compensatory order of the Board is to repair the economic result of the loss of employment not to simply require an employer to pay what he would have had to pay to the employees if they had not been terminated. The complainant noted that the evidence would disclose that there were two categories of employees at the respondent: gratuity and non-gratuity. The latter work in areas where there is no customer contact (e.g., the kitchen). The gratuity employees are paid a lower rate of pay to reflect the fact that they receive gratuities. Similarly, there is a difference between the rate of pay for gratuity employees who work the breakfast shift and those who work the dinner shift. The breakfast shift receive higher wages to reflect the fact that they receive less in gratuities than the dinner shift employees. All of this supports the conclusion that gratuities are an integral part of the earnings the grievors received and could reasonably be expected to continue to receive if their employment had not been wrongfully terminated.

5. The respondent argued that the Board, in exercising its remedial powers under section 89, is balancing two principles. One of the principles is to make the persons whose rights have been violated whole; but another principle is that the Board ought not to turn a compensatory order into one that is punitive. The latter principle was espoused by the Board in its two related decisions in *Heritage Manor Rest Homes*, [1983] OLRB Rep. Mar. 385, application for reconsideration dismissed by unreported decision dated April 27, 1983. The Board rejected an argument made by the complainant in that case that grievors who were doing 20% more work in the same number of working hours as a result of the illegal layoffs/reduction in working hours should receive 20% more in wages. On reconsideration the Board affirmed

its rejection of this argument on the basis that to award such an increment would, in the circumstances of that case, go beyond compensation into the realm of punitive measures. According to the respondent, this principle means that the Board will award less than a court would. For example, the Board would not award additional compensation applying the quantum merit principle as the courts do in actions where there has been a variation amounting to an addition to a construction contract. The respondent's second major argument was that section 89(4)(c) which provides that the Board may include in a remedial order:

“an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement *for loss of earnings or other employment benefits* in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally”,

(emphasis' added)

provides a legislative direction tying compensatory orders to “earnings”. Gratuities are not earnings; they are gifts. This distinction has been established in *Barnes et al. v. Krisbair Tavern Limited*, 82 CLLC ¶14,190 (Cty. Ct.), appeal dismissed Ont. C.A. March 15, 1983. In that case the court was asked to determine whether the practice of two managers (not owners) of a restaurant requiring the waiters and waitress to share with them 1% of gross sales constituted a violation of the *Employment Standards Act*, R.S.O. 1980, c.137. The court found that unless it was shown that the practice resulted in the waiters'/waitress' wage falling below the “tipped minimum wage”, it was not contrary to the *Employment Standards Act*. The evidence did not disclose this to be the case. In the course of making its determination, the court commented that the parties were not in dispute about the ownership of the tips and gratuities. They were a “gift” from the patron to the server in appreciation for service received. The dispute was as to whether payment of 1% of the gross sales by each server meant that the money left in the employee's hands fell below the “tipped minimum wage”. The respondent utilized this decision to argue that in view of the fact that the gratuities represent an amount which more than doubles what the employee takes home, it would be punitive to expect the respondent to repay what essentially is a gift. Finally, the respondent argued that the *Hallowell House* decision is not relevant because gratuities are not analogous to an award of interest on lost earnings because interest is a “secondary” payment dependent on a primary amount, earnings. Gratuities are not secondary in the same way. The respondent pointed out that although for income tax purposes gratuities are considered earnings, this Board should interpret the legislative direction indicated in section 89(4)(c) more restrictively.

6. The applicant argued in reply that gratuities are a part of the loss which ought to be restored to the grievors by the respondent. The Board ought to consider them earnings in the same way as Revenue Canada does for income tax purposes. To grant compensation for lost gratuities would not be punitive because the definition of punitive damages is those payments over and above actual financial loss of the individual. The payment by the respondent of gratuities lost does not fall within this definition. It cannot be brought within this definition simply by claiming that the respondent would never have had to pay the amounts because they are “gifts” from customers. Gratuities fall within the boundaries of claimable damages because their loss was caused by the wrongful act of the respondent. The loss to the grievors

flows directly from the breach of the Act and is a proveable, actual, financial loss. That the money left in the employee's hands fell below the "tipped minimum wage". The respondent utilized this decision no cases to the contrary.

7. Section 89(4) gives the Board wide remedial powers to rectify the effects of a contravention of the Act. The Board is charged with determining "what, if anything, (the wrongdoer) shall do or refrain from doing ... and such determination, without limiting the generality of the foregoing, may include:

(a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;

(b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or

(c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

The simple answer to the respondent's argument regarding the legislative direction of this subsection as a totality is best made by quoting the Divisional Court in its decision dealing with the decision *Radio Shack*, [1979] OLRB Rep. Nov. 1220; appl. for jud. rev. dismissed *Re Tandy Electronics Limited and U.S.W.A.* (1980), 30 O.R. (2d) 29, 115 D.L.R. (3d) 197, 80 CLLC ¶14,017:

It should be noted that cls. (a) to (c) do not detract from the wide powers given to the Board by s. 79(4) [now s. 89(5)] for those sub-paragraphs are preceded by the words *without limiting the generality of the foregoing*. It may also be of significance that the subsection was amended in 1975 so that the union could launch a complaint and the powers of the Board were widened. Since the amendment, the Board has, in three earlier decisions held that it was empowered to award such damages.

So long as the award of the Board is compensatory and not punitive; so long as it flows from the scope, intent, and provisions of the Act itself, then the award of damages is within the jurisdiction of the Board. The mere fact that the award of damages is novel, that the remedy is innovative, should not be a reason for finding it unreasonable.

8. As this excerpt and numerous other decisions have recorded, the principle operative behind any determination pursuant to section 89(4) is to *remedy* the breach of the Act, not to punish the wrongdoer. In remedying the effects of the breach, the Board is most concerned with restoring the labour relations status quo. Remedies under section 89(4) must be designed primarily to correct and rectify situations caused by unfair labour practices. Where there have

been terminations contrary to the Act, the major way to restore the labour relations status quo is to order the reinstatement of those terminated and to order them placed, through the payment of money, in the position they would have been in if the violation had not taken place. It is not a principle which primarily grows out of contract. In most instances the labour relations status quo is restored by the payment of lost wages with interest thereon. This is meant to show to the employee affected that his/her rights under the Act have been upheld and that he/she has not suffered permanent economic loss as a result of the employer's wrongdoing.

9. Where the source of an employee's economic position is supported by the employer and the employer's customers, the principle to be applied is no different. The employee whose rights have been interfered with ought not to be required to bear part of his/her economic loss caused by the employer's wrongdoing. Even though the employer would not, under normal circumstances, be the insurer or guarantor of the payment of gratuities, the employer has created, through his wrongdoing, an abnormal situation. Not only has the wrongful termination resulted in a loss of wages, but it has also resulted in the loss of opportunity to earn additional money through gratuities. There may be less certainty as to what that opportunity would have actually produced but the lack of certainty is not in and of itself a reason for not including it as a part of an order for compensatory damages. For example, the Board has awarded damages and interest thereon for the "loss of opportunity" to negotiate a collective agreement of the employer's unlawful conduct (see *Radio Shack*, supra) where this was necessary to restore the labour relations status quo.

10. If the Board were not to order the employer to pay probable losses in gratuities, the labour relations status quo would not be restored. Those employees who were terminated will have suffered economic loss as a result of the employer's wrongdoing and the employer, by this means, would be permitted to leave a tangible and continuing sign of this economic power which can be exercised over his employees. It is trite to say that the economic control an employer has over an employee is considerable. In this instance part of that control is over the opportunity to earn additional money through gratuities. There is no reason why the Board should not move to restrain the wrongful exercise of this control in the same way as it restrains the wrongful exercise of the employment contract, there may be difficulties in assessing what the economic status quo is insofar as gratuities are concerned. passed within the same wrongful act.

11. This is not a punitive order because we are simply restoring the labour relations (economic) status quo. The employees have not experienced a windfall and are not receiving any more than they would have if the wrongful acts had not been committed (unlike the employees in *Peter Nursing Home*, supra, who stood to gain upwards of 20% more pay for the same hours of work). While principles operative in the assessment of damages as a result of a breach of an employment contract are relevant, they are not exportable into the realm of remedies under section 89(4) without an evaluation of their effect on the labour relations circumstances of the parties. However, we are satisfied that the reasoning of Lush, J. in *Manubens v. Leons*, supra, ought to be applied in these circumstances. As for the statement in *Barnes et al. v. Krisbair Tavern Limited* that gratuities are "gifts" rather than wages, this was made in the context of an interpretation of the *Employment Standards Act* wherein there is a clear definition of what that Act intends "wages" to mean and wherein the section being interpreted contained a clear prohibition against wages falling below a fixed minimum. The purpose of the *Employment Standards Act* is different from that of the *Labour Relations Act*, the

former being mainly concerned with enforcing certain minimum standards of employment. The *Labour Relations Act* is directed, among other things, at enforcing standards of conduct which ensure employees freely exercise their right to choose or refrain from choosing a union to represent them. Where an employer has interfered with such freedom, the remedy must restore it as much as possible. For these reasons *Barnes et al. v. Krisbair Tavern Limited* has no relevance to the issue before us.

12. As mentioned above, there may be difficulties in assessing what the economic status quo is insofar as gratuities are concerned. These difficulties must be resolved on the basis of evidence which the Board considers appropriate and reflecting a reasonably accurate picture of what is the probable value of the lost opportunity for gratuities. This is essentially a question of fact. Notwithstanding these potential difficulties, the Board is of the view that a remedial order of the Board ought to, in these circumstances, include compensation for lost gratuities.

13. The parties have agreed to a continuation of this hearing on August 22 and 23, 1983, for the purposes of adducing evidence in connection with this and other outstanding issues. They have agreed that this panel is not seized with these matters.

1017-83-M Ontario Public Service Employees Union, Applicant, v. Royal Ontario Museum, Respondent

Employee – Employee Reference – Practice and Procedure – New position advertised but not yet filled – “Person” must testify as to duties in employee referral – Application premature since no person able to testify as to duties – Board comparing *City of Barrie* decision

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

DECISION OF THE BOARD; August 31, 1983

1. This is an application under section 106(2) of the *Labour Relations Act* requesting the Board to determine whether the “new position created by the employer – Exhibit Project Co-ordinator – is covered by the collective agreement”.

2. The Board would note initially that the question which it determines under section 106(2) of the Act is whether a person is an “employee” *for the purposes of the Act*. The answer to this question may have the effect of resolving any dispute between the parties as to whether or not the position is also covered by the collective agreement, but it need not necessarily do so. Compare, for example, *Nelson Crushed Stone*, [1980] OLRB Rep. Oct. 1500.

3. Beyond this, the respondent employer points out that the new position in question

is only now at the stage of being advertised and interviewed for, and that no person has yet, or may ever, be selected to fill the position.

4. The Board finds the present application to be premature. Section 106(2) of the Act speaks of a "person", and not of a "position". It is only the status of a particular individual, therefore, which technically can be in dispute under the section. The Board noted in the *Corporation of the City of Barrie*, [1983] OLRB Rep. Aug. 1239, that evidence of extensive practice in a new position is not essential in every case for the Board to make a determination under section 106(2). However, the actual individual in dispute must at least be able to testify before the Board as to his or her ongoing role in the organization, and to the extent of the authority which he or she understands that he or she has been given. There is at the present time no "person" in dispute, nor individual to give the Board such evidence.

4. The application at this time is dismissed.

0616-83-U Local 354, United Textile Workers of America, Complainant, v. Silknit Limited, Respondent

Adjournment – Discharge for Union Activity – Interference in Trade Unions – Hearing scheduled during plant shut-down period – No adjournment of absence of evidence of inconvenience or unavailability of witnesses – Company refusing to recognize grievor as union steward – Terminating grievor for attitude and causing disruption – Vigorous policing of collective agreement reason for discharge – Discharge unlawful

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members W. F. Murray and S. Cooke.

APPEARANCES: *Guy Beaulieu and Zafar Islam for the applicant; John P. Sanderson, Q.C. for the respondent.*

DECISION OF THE BOARD; August 12, 1983

1. This is a complaint under section 89 of the *Labour Relations Act*. The complainant union alleges that on June 20, 1983, Zafar Islam, its president, was illegally discharged. The provisions of the *Labour Relations Act* arguably relevant to this matter are as follows:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall

be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

80.-(1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten dismissal or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

(a) discriminate against a person in regard to employment or a term or condition of employment; or

(b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

2. This complaint was filed on June 22, 1983. In accordance with its usual practice the Board appointed a Labour Relations Officer to meet with the parties and endeavour to effect a settlement. At the same time the Registrar of the Board fixed July 21, 1983 as the date for a hearing in this matter, and notice of hearing in Form 8 was served on each of the parties. That notice, contains the following notation in bold type:

“IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS”

3. Following receipt of the notice of hearing there were discussions between the parties in an effort to reach agreement upon an alternative hearing date more acceptable to the respondent employer. The date fixed for the hearing falls within the company's annual plant shutdown and there was apparently some concern that a hearing held at that time might interfere with the witnesses' vacation plans. The complainant was concerned about the prospect of delay but was prepared to seek an accommodation on the clear understanding that if no mutually acceptable alternative date could be agreed upon the hearing would proceed as scheduled. The complainant suggested alternative dates prior to the plant shutdown and it appeared that there was tentative agreement to proceed on July 14th. Subsequently however the complainant was advised that this date was not acceptable. Accordingly, the case came on for hearing as scheduled.

4. At the opening of the hearing counsel for the respondent told the Board that he was instructed to request an adjournment of the proceeding to a later date. However, when questioned about the basis for the company's request he acknowledged that the company had been advised: that it bore the onus of proof in these proceedings; that the union was insisting on proceeding on July 21st; that an adjournment would not necessarily be granted automatically upon request or because of possible inconvenience or interference with vacation plans; and that the hearing could well proceed in its absence if an adjournment was not granted. None of the respondent's witnesses were present to clarify what inconvenience, if any, there might be if the hearing proceeded as scheduled. There was no evidence before the Board to incite that they could not be available. They had not been subpoenaed although it was clear prior to the shutdown that the hearing could proceed on July 21st, and counsel had no direct information as to where these individuals were. In other words, the respondent, for its own reasons, has chosen to put its counsel in the unenviable position of seeking an adjournment without any clear or direct evidence of hardship or inconvenience to the respondent or its officials.

5. The complainant strenuously opposed the request for an adjournment. The complainant submitted that it had tried to be reasonable and accommodate the respondent but had made it clear, throughout, that it would insist upon proceeding on July 21st if no early alternative date was available. The complainant submitted that this was clearly communicated to the respondent *prior* to the shutdown and there was no reason why the respondent's witnesses could not be available. Not only was there no direct evidence of inconvenience but, in addition, the union witnesses were present and ready to proceed on July 21st notwithstanding some inconvenience to their vacation plans. The complainant noted that this is the second unfair labour practice complaint filed on Mr. Islam's behalf, that it involves a pattern of alleged misconduct directed at the local union president and that he should not have to remain "on the street", without work or remedy simply because company officials might find attendance at the hearing inconvenient. Although he was not in a position to lead direct evidence on the matter, counsel for the complainant told the Board that it was his information that, Peter Webb, the respondent's Industrial Relations Manager, was at the plant as late as a day or two before. Finally, the complainant pointed out the obvious impact on the employees in the bargaining unit of the removal of their union president for his union activities on their behalf. In his submission, the balance of prejudice clearly weighed in favour of proceeding.

6. In the circumstances the Board was not persuaded that the respondent employer had made out a basis for its request for an adjournment. The request was therefore dismissed. Following the Board's ruling, counsel for the respondent indicated that his instructions were limited and that he would therefore, not be taking any part in the hearing. He thereupon withdrew.

7. The complainant chose not to rely on the "reverse onus" provisions in section 89(5) of the *Labour Relations Act*. Rather, the complainant opted to lead evidence to establish the factual foundation for its case and the remedy requested. That evidence was, of course, uncontradicted.

8. The grievor, Zafar Islam, is one of approximately 270 bargaining unit employees employed by the respondent at its plant in Cambridge, Ontario. He has been employed by the company since 1976. He was president of the complainant union from 1977 to September of 1982 and, more recently, from early June of 1983 until his discharge on June 20th. In order to put that discharge in context, it is necessary to review certain of the precedable position of seeking an adjournment without any clear or direct evidence of hardship or inconvenience to the rants having little facility with the English language or knowledge of their rights as employees. Prior to his becoming union president some years ago the trade union representatives had not been particularly active in "policing" the collective agreement, filing grievances or otherwise actively performing their representational functions. By all accounts Mr. Islam was an active and aggressive trade union official.

10. Mr. Islam resigned from his position as local union president in September of 1982. He told the Board that his decision was based, in part, on what he believed to be company harassment. He had been discharged on two previous occasions then reinstated with full compensation when he filed grievances, and it is interesting to note that the purported reason for one of the discharges was that he and the other members of the union executive had planned to meet during their lunch hour to discuss union business. The employer took the position that there could be no such discussion on company premises without prior permission. In any

event, by September of 1982, Mr. Islam felt that he had done his share and was content to see the mantle of union office pass to someone else.

11. Mr. Islam was drawn back into activity in December of 1982 when the company proposed a rollback of the terms of the current two-year agreement which was executed some six months before on April 29, 1982. Mr. Islam was the local union president and on the bargaining committee at the time this agreement was signed, and he spoke vigorously against the proposed wage rollback. He told the employees that, from his experience, there was little justification for demanding a 45¢ per hour wage cut for the bargaining unit employees while at the same time giving a five per cent wage increase to the salaried employees. Mr. Islam also explained that the company's business was somewhat cyclical, and that although things were then slow, business could be expected to pick up in March and April when there was likely to be considerable overtime – as was indeed the case. He urged that the employees reject the employer's proposition and stick with a contract that had been negotiated barely six months before. The employees accepted his position and unanimously rejected the employer's proposed wage cut. No doubt Mr. Islam's role in this process did little to endear him to his employer.

12. The next event of significance arose in February, 1983 when the grievor was selected as shop steward in the dyehouse. The company refused to recognize him. By letter dated February 24, 1983 the company wrote to the St. Catharine's office of the union to advise:

“We have been informed that Mr. Z. Islam has been appointed as dye-house shop steward. We wish to make it absolutely clear that the company feels this to be a negative and retrograde step. It will acutely reflect upon the smooth and mainly efficient operations of the Local 354 committee, and as a company, *we are not prepared to accept this employee as a union representative mainly due to the man's attitudes and previous work history.*”

It is not entirely clear what the company is referring to when it mentions the grievor's attitude or work history. The grievor has no record of misconduct, nor is there any indication that he has been disciplined for poor work performance. He expressly denied that this was the case; and, of course, even if it was true, this would not provide a basis for refusing to acknowledge the duly appointed representative of the trade union.

13. As a result of the company's failure to recognize his status as a union official, Mr. Islam filed a grievance dated March 8, 1983. In its reply to that grievance the company took the position that it had received no written authorization of the grievor's claim and that until such written authorization was received, it would not recognize the grievor as the dyehouse shop steward. There is no basis in the collective agreement for that demand, nor had it been the company's past practice to require written authorization or notification of the appointment of a new shop steward.

14. By letter dated March 11, 1983 Jules Lemay, an international representative of the United Textile Workers of America, informed Peter Webb, the Personnel Manager, that Mr. Islam was the new steward in the dyehouse. Such notification made no difference. A memo from Webb to the department heads and supervisors concerning a shop steward meeting scheduled for March 16, 1983 contains the following comment:

“You will be aware that the company have not yet agreed to the nomination from the UTWA of Z. Islam for dyehouse shop steward and until this is resolved the company will not be in favour of releasing this person from his normal duties.”

The reference was to the release of union officials from their regular duties to attend a meeting at a local Holiday Inn. Mr. Islam was not permitted to attend. At the second step reply to Mr. Islam's grievance Mr. Webb wrote:

“A written notification was received by the company on 14th March, 1983 advising of Z. Islam's appointment as shift shop steward. The company cannot recognize this appointment because of (a) the manner in which the names on the petition were obtained and (b) Z. Islam's past record with the company.”

15. By letter dated March 29, 1983 Vernon Mustard, the Canadian Director of the International Union wrote to Mr. Webb to protest his actions, pointing out that the company had no right to intervene in internal union affairs or refuse to recognize a duly appointed union official. The letter had no effect. On April 13, 1983 Mr. Webb wrote to the union as follows:

“Following our recent discussions regarding the company recognizing Mr. Z. Islam as Dyehouse Dayshift Shop Steward, we have, after careful deliberation and a [sic] advice decided that we cannot change our position on this issue.

Regrettable as it may be, the employee's past and present record cannot be ignored by us on such an important position.”

This correspondence was appended to the unfair labour practice complaint filed on the grievor's behalf on May 6, 1983 and settled on June 2, 1983. It is difficult to resist the conclusion that the “record” referred to was not a record of misconduct but rather Mr. Islam's vigorous policing of the collective agreement and activities on behalf of the bargaining unit employees.

16. On March 23, 1983 the grievor was called to the office of Jack Bronson, the company president. Bronson demanded that he give up his activities with the union. Bronson told the grievor that he (Bronson) had the power and the money and that he would be prepared to use it to get rid of the grievor.

17. In June of 1983 certain members of the local union executive resigned leaving vacant *inter alia*, the position of president which the grievor had held before. An election was held and the grievor was returned to office. Shortly thereafter, on June 15, 1983, he requested a meeting with the company to discuss ongoing problems. Mr. Islam was advised that Webb would not be available that week and that the next union management meeting would be held on June 20th. On or about June 16th Mr. Islam recommended that the newly elected Vice-President investigate the job vacancy complaint of one of the bargaining unit employees and, if it could not be satisfactorily resolved, to file a grievance. This was done. A grievance was filed.

18. On June 20, 1983, the day fixed for the union-management meeting, Mr. Islam was

summoned to a meeting with certain management officials, including Webb, and given the following letter of termination:

“Dear Mr. Islam:

Following our interview with you today, the Company is terminating your employment as from 3:00 p.m., Monday, June 20, 1983.

The reasons given were as follows:

1. Breach of the Settlement dated June 2, 1983 with the Ontario Labour Relations Board and the Company.
2. Continued disruptive measures against the Company.
3. Your attitude of irresponsibility toward the Company and its procedures, and
4. Your blatant disregard for adherence of the United Textile Workers of America Grievance procedures.

The matter was discussed in the presence of Mr. A. Metcalfe, Dye-house Manager, Mr. D. Wilson, Plant Chemist, and Mr. P. Webb, Industrial Relations Manager.

Yours truly,

Peter Webb for

SILKNIT LIMITED”

Following receipt of the letter, Mr. Islam was told that he was no longer an employee and since the union had no president there could be no meeting. As before, Mr. Islam filed a grievance. In contrast with its usual practice, the company refused to permit the third step meeting to discuss Mr. Islam’s grievance to be held on company premises. Again, it is difficult to resist the conclusion that the “disruption” and “irresponsibility” referred to, stem from the company’s displeasure with the vigorous way in which Mr. Islam is promoting what he believes are his members’ collective bargaining interests.

19. The complainant union contends that the employer has engaged in a pattern of egregious interference with the internal affairs of the union, with Mr. Islam’s right to engage in lawful trade union activity, and with the employees’ right to trade union representation. We agree. Union officials play an important role in the collective bargaining process, particularly in the area of contract administration. Indeed, the instant collective agreement recognizes this fact. Inevitably, those union officials will have to seek information from and question management representatives about their actions or about work conditions, and the grievance procedure, like the collective bargaining process itself, will have its adversarial aspects. While tact and diplomacy are important if the job of a union official is to be performed effectively, employees cannot be harassed, victimized or put in fear for their own jobs if they choose to

stand for union office or, once elected, seek to effectively pursue the grievances of their fellow employees. If an employer were permitted to pick and choose whom it could recognize and rid itself of union officials with whom it was displeased, the independence of the union would be totally compromised and the employees' statutory rights largely illusory.

20. For the purposes of this decision, it is unnecessary to explore the ambit of protected union activities. We do note parenthetically, however, that while "work time is for work" and an employer has a legitimate business interest in maximizing efficiency and minimizing disruptions, the Board has been reluctant to unduly restrict activities otherwise protected by the statute where there is no demonstrable business interest. In the case of blanket no solicitation rules, for example, the Board has indicated that during breaks or lunch periods the employees are entitled to use non-working time as they see fit, so long as they do not engage in disorderly conduct or otherwise adversely effect other legitimate business interests of the employer. The approach of the statute and the Board has been to attempt to create a meaningful balance between the statutory rights of employees and the proprietary and commercial interests of employers.

21. In any event, on the evidence before us, we find that the grievor's discharge was in breach of sections 64, 66 and 70 of the Act, and constitutes a serious interference with the right to engage in lawful union activity guaranteed by section 3 of the Act.

22. This brings us then, to the appropriate remedy. It goes without saying that the grievor must be immediately reinstated and compensated for all lost wages and benefits together with interest. We so award. [See *Hallowell House* [1980] OLRB Rep Jan. 35]. However, we do not think that this, in itself, is sufficient, for it does not redress the "chilling effect" on other employees who would be aware of the discharge and understand its origin. The evidence before the Board is that Mr. Islam's discharge is a matter of some concern to the employees who recently elected him to represent them; moreover, the dismissal of the grievor in the circumstances here conveys a strong warning to other employees which would inevitably dissuade them from engaging in activities which, in fact, are protected by the statute. The mere reinstatement of Mr. Islam with back pay may do little to reassure his fellow employees that the employer is required to live within the requirements of the statute and that effective remedies exist if it does not. The imbalance of economic power between the employer and his employees, does not give the employer carte blanche to ignore their statutory rights – notwithstanding the comments of Mr. Bronson to the grievor in this case. The employees must be seen to have an effective remedy. Accordingly, the Board makes the following orders and remedial directions:

- (1) The Board directs that the respondent immediately reinstate the grievor, Zafar Islam, to his former position, and that the grievor be compensated, forthwith, for all wages and benefits lost together with interest thereon, arising from his unlawful discharge.
- (2) The Board directs that the respondent cease and desist from interference with the representation of bargaining unit employees by the United Textile Workers of America, Local 354 and its designated representative, and in particular Mr. Islam, the local union president.
- (3) The Board directs that the employer post at its place of business cop-

ies of the attached notice "Appendix". Copies of such notice to be furnished by the Registrar shall, after being duly signed by an authorized representative of the respondent, be posted immediately upon receipt thereof, and be maintained for a period of 60 consecutive working days thereafter. Such notices must be posted in conspicuous places where they are most likely to come to the attention of the employees in the bargaining unit, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to ensure that such notices are not altered, defaced, or covered by any other material. Representatives of the complainant union shall have reasonable access to the respondent's premises to ensure that the respondent has complied with this directive.

23. The Board will remain seized of this matter in the event that there is any difficulty in calculating the quantum of compensation to which Mr. Islam is entitled by reason of this remedial direction.

0093-83-U London and District Service Workers Union, Local 220. S.E.I.U., A.F.L., C.I.O., C.L.C., Complainant, v. St. Raphael's Nursing Home, Respondent

Collective Agreement – Duty to Bargain in Good Faith – Practice and Procedure – Hospital interest arbitration procedures instituted prior to introduction of *Inflation Restraint Act* – Arbitration Board having jurisdiction to continue after passage of Act – Act and regulation making only compensation plan (not whole collective agreement) of no effect – No duty to bargain since collective agreement in effect – Board declaring agreement in effect – leaving it to parties to make compensation plan comply with *Inflation Restraint Act*

BEFORE: G. Gail Brent, Vice-Chairman and Board Members F. W. Murray and B. Lee.

APPEARANCES: *Randy L. Levinson and Paul Middleton for the complainant; Bernie McGarva, Hugh MacLean and Arthur Schelter for the respondent.*

DECISION OF THE BOARD; August 11, 1983

1. The complainant has alleged that the grievors have been dealt with by the respondent contrary to sections 15 and 50 of the *Labour Relations Act*.

2. On November 18, 1981 the complainant was certified as bargaining agent for the respondent's employees. The complainant and the respondent subsequently began negotiations but failed to reach a first collective agreement. On August 25, 1982 a board of arbitration was appointed pursuant to the *Hospital Labour Disputes Arbitration Act* to resolve all outstanding contractual issues in dispute.

3. On September 21, 1982 the *Inflation Restraint Act* was given first reading in the Legislature. The board of arbitration had scheduled a hearing to take place on October 4, 1982. The respondent attended the hearing and requested that the board adjourn in view of the introduction of the *Inflation Restraint Act*. The board of arbitration did not grant an adjournment as requested, and the respondent refused to participate in the hearing. The board

of arbitration attempted to get the respondent to participate in the hearing; however, despite those attempts and a clear warning that it would be leaving at its peril, the respondent left the site of the hearing and refused to participate whenever invited to do so. Specifically, the respondent was given the opportunity to send the board a written response to the complainant's brief, and refused to make any submissions to the board at all.

4. On November 25, 1982 the board of arbitration issued its award to the parties. The respondent refused to execute a collective agreement based on the award.

5. On December 15, 1982 the *Inflation Restraint Act* was passed and proclaimed in force as of September 21, 1982.

6. On December 29, 1982 the complainant requested the board of arbitration to order the parties to sign the collective agreement. The board of arbitration complied with that request on January 12, 1983. Pursuant to section 10(7) of the *Hospital Labour Disputes Arbitration Act* a collective agreement comes into effect five days after the order if the agreement is not executed. The agreement was not executed by the respondent.

7. The collective agreement which is the subject of the board of arbitration's order purports to cover the period from November 18, 1981 to November 17, 1983.

8. On January 20, 1983 Ontario Reg. 57/83 was promulgated dealing with first collective agreements and the *Inflation Restraint Act*.

9. The respondent has refused to implement any of the collective agreement which arose out of the board of arbitration's order. Its position throughout has been, and continues to be, that the collective agreement is a nullity, and that the award of the board of arbitration is a nullity and of no force and effect whatsoever. On January 26, 1983 the Union filed group and policy grievances regarding the respondent's non-compliance with the collective agreement. The respondent refused to entertain the grievances and refused to name a nominee to sit on a board of arbitration to deal with the grievances.

10. On March 2, 1983 the complainant applied to the Office of Arbitration to have both an employer nominee and a chairman appointed. The Office of Arbitration took the position that it could not appoint anyone until it had evidence that the collective agreement had been filed with the Inflation Restraint Board pursuant to O. Reg. 57/83 and had met the requirements of that regulation. On March 24, 1983 the complainant and the respondent met and the complainant took the position that the last year of the awarded collective agreement (November 18, 1982 to November 17, 1983) should be designated as the year for the 5% increase pursuant to section 2(2)(a) of O. Reg. 57/83. The respondent took the position that there was no collective agreement and that negotiations for a first collective agreement should start afresh. The respondent also took the position that, pursuant to Part II of the *Inflation Restraint Act*, the maximum increase which it could give to the employees was 9% and that it would so increase the wages. Needless to say, the awarded collective agreement calls for increases in compensation which are greater than 9% and 5%

11. On April 13, 1983 the respondent applied to the Inflation Restraint Board and filed a copy of the awarded agreement with it. On April 29, 1983 the Inflation Restraint Board informed the complainant that the collective agreement did not meet the requirement set out

in section 2(2)(a) of O. Reg. 57/83 and would therefore be subject to Part II of the *Inflation Restraint Act*.

12. Were it not for the *Inflation Restraint Act* and its regulations there would be no question that the parties were bound by a collective agreement and that the collective agreement by which they were bound was the one awarded by the board of arbitration. The essence of the problem before us is to determine what effect, if any, the *Inflation Restraint Act* has had on this situation.

13. The regulation dealing with first collective agreements (O. Reg. 57/83), which has been referred to above, is set out below:

1. In this Regulation, "first collective agreement" means a collective agreement that is not an interim agreement for an increase in compensation rates entered into by a bargaining unit referred to in subsection 2(1) in contemplation of a further agreement.

2. (1) Where, on or before the 21st day of September, 1982, a trade union has been certified as bargaining agent of the employees in a bargaining unit to whose compensation plan this Part applies, and such employees have not entered into their first collective agreement with their employer prior to the 22nd day of September, 1982, Part II of the Act terminates with respect to the compensation plan of such employees when,

- (a) they have entered into a first collective agreement that fully complies with the provisions of this section; and
- (b) the first collective agreement so entered into has been filed with the Board at least thirty days before the agreement is to take effect.

(2) A first collective agreement complies with this section if it provides for the minimum increases under subsections 12(2) and (3) of the Act, and if,

- (a) subject to subsections 12(2) and (3) of the Act, the compensation plan included in the collective agreement provides, for any period of twelve months beginning not earlier than the 1st day of October, 1982, and not later than the 1st day of October, 1983, for an increase in compensation rates of neither more nor less than 5 per cent over the compensation rate applicable on the day immediately preceding the twelve-month period; and
- (b) subject to clause (a), the provisions of the first collective agreement for the whole period of the agreement ending with the expiry of the twelve-month period referred to in clause (a) are substantially comparable with the provisions of collective agreements of employees in similar occupations in the same or related labour markets for that period.

14. The Board has already considered the effect of the *Inflation Restraint Act* in two collective bargaining situations: *Broadway Manor Nursing Home*, [1983] OLRB Rep. Jan. 26 and *The Doctors Hospital* [1983] OLRB Rep. Feb. 227. Although the first case specifically stated that it did not speak to the *Inflation Restraint Act's* effect on first contract negotiation, the Board took the position, at paragraph 21, "that every effort should be made to interpret *Bill 179* in a manner which does not interfere with the rights of employees under the *Labour Relations Act*", and further, in the same paragraph, stated:

The rights established under the *Labour Relations Act* and the *Hospital Labour Disputes Arbitration Act* ought not to be interfered with by the operation of another statute unless it is manifestly clear on a reading of the other statute that such a result is intended.

15. *The Doctors Hospital* case, *supra* did deal with a first collective agreement under the *Hospital Labour Disputes Arbitration Act*; however, in the context of a totally different fact situation than that which we face. There the Board was not dealing with a possible first collective agreement but with the appointment of a conciliation officer. The approach taken in *The Doctors Hospital* case, *supra* was consistent with that taken in *Broadway Manor Nursing Home*, *supra* in that both cases accept the proposition that the two labour relations statutes with which we are concerned should be presumed to be left intact unless the *Inflation Restraint Act* specifically intends some other result.

16. It is clear that O. Reg. 57/83 applies to first collective agreements. We believe that it is equally clear, especially following *The Doctors Hospital* case, *supra*, that, while the *Inflation Restraint Act* and O. Reg. 57/83 operate to affect compensation in first collective agreements, they do not operate to suspend the procedure set up in the *Hospital Labour Disputes Arbitration Act* to achieve that first collective agreement. In our case, those procedures were already underway before the *Inflation Restraint Act* and O. Reg. 57/83 were introduced, and the arbitration board decided to continue after the *Inflation Restraint Act* had received first reading. We accept that the board of arbitration had the jurisdiction to continue even in the face of the impending inflation restraint legislation.

17. Part II of the *Inflation Restraint Act* encompasses sections 4 to 25 inclusive and is headed "PUBLIC SECTOR COMPENSATION RESTRAINT". In section 2(1) of the regulation the conditions are set out by which Part II "terminates with respect to the compensation plan" of the employees concerned. Section 16 of the *Inflation Restraint Act* reads as follows:

16. Notwithstanding any other Act or agreement, any provisions of a compensation plan to which this Part applies that provides for an increase in compensation rates in excess of the limits set out in this Part on or after the 21st day of September, 1982 shall be of no effect.

18. In section 16 of the *Inflation Restraint Act* the Legislature has not gone so far as to declare the entire collective agreement to be void and of no effect. This provision takes the doubt out of the sort of situation with which employers and unions were faced during the period when the federal Anti-Inflation Board was rolling back wages, and when there was conflicting opinion about whether a rollback would void an entire collective agreement. Section 16 deals only with the compensation plan and provides that only the compensation plan is of "no effect". The conclusion that the Legislature did not intend to void collective agree-

ments, but considered compensation plans to be severable, is further reinforced by reference to section 20 of the *Inflation Restraint Act* which allows the isolation and modification of a compensation plan which does not meet the requirements of the legislation. There is no indication in O. Reg. 57/83 that the question of the validity of first collective agreements should be treated any differently than that of existing collective agreements.

19. The result, therefore, is that the parties have a valid collective agreement but since the agreement does not comply with O. Reg. 57/83, Part II of the *Inflation Restraint Act* applies with the result that the compensation plan provided therein is of no effect, but is replaced by a compensation plan, the terms of which comply with sections 10 and 12 of that Act. Since the collective agreement achieved through arbitration has not been voided by operation of the *Inflation Restraint Act*, then the duty to bargain in good faith in order to achieve a collective agreement cannot arise. Accordingly, there can be no violation of section 15 of the *Labour Relations Act* on these facts.

20. This Board therefore declares, pursuant to section 50 of the *Labour Relations Act*, that the parties have a collective agreement and are bound by the terms of that agreement' save for the "compensation plan" contained therein, since it is of no effect by virtue of section 16 of the *Inflation Restraint Act*. The Board could only make a declaration to the effect that the "compensation plan" contained in the collective agreement was binding on the parties if the relevant provisions of the *Inflation Restraint Act* were complied with and section 16 of that Act no longer applied to the "compensation plan". This Board has no jurisdiction to alter the "compensation plan" or to determine whether the original board of arbitration, or anyone else, has jurisdiction to alter or amend the compensation plan to meet the requirements of the *Inflation Restraint Act*.

21. It may be that the original board of arbitration could have retained jurisdiction to deal with the question of the compensation plan if the parties were unable to agree on its amendment or either party could have applied to the Inflation Restraint Board under section 14. What appropriate course of action either or both parties might take is a question that is beyond the jurisdiction of this Board to determine. In view of the provisions of the *Labour Relations Act*, the *Hospital Labour Disputes Arbitration Act*, and the *Inflation Restraint Act* we can only determine that all of those acts have combined to give the parties a valid collective agreement with a compensation plan which is severable, and is, at least for the meantime, of no effect. The extent of our jurisdiction is to make such a declaration and order the respondent to implement the entire collective agreement. The parties should now meet to amend the compensation plan to make it comply with the *Inflation Restraint Act*. The parties will have to determine the means which may be available to them, to alter or amend the compensation plan to comply with the requirements of the Inflation Restraint legislation and regulations.

22. Having regard to the foregoing, the Board hereby declares that the respondent is bound by the collective agreement which was established for the parties by the board of arbitration on January 12, 1983, save and except for the compensation plan contained therein, and hereby directs the respondent to implement the said collective agreement, save and except the compensation plan contained therein.

0646-83-R International Ladies' Garment Workers' Union, Applicant, v. Vogue Brassiere Incorporated, Respondent, Group of Employees, Objectors

Charges – Membership Evidence – Union official raising possibility of purchasing employee's car and finding job for employee's boyfriend in course of soliciting union membership – Not made conditional upon employee signing membership card – Board finding no objectionable conditional payment of dollar

BEFORE: M. G. Mitchnick, Vice-Chairman and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: *S. B. D. Wahl and H. Stewart for the applicant; Brian P. Smeenk, F. Piltz, E. Lazarich and J. Priebe for the respondent; Barbara Kirk and Dawna Martin for the objectors.*

DECISION OF THE BOARD; August 17, 1983

1. The name of the respondent is amended to read: "Vogue Brassiere Incorporated."
2. This is an application for certification.
3. The Board finds that the applicant is a "trade union" within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, the Board further finds all employees of the respondent in Cambridge, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff, designers, mechanics, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, to be a unit appropriate for collective bargaining.
5. The applicant filed membership evidence well in excess of the level normally required for certification without a vote. There were, however, charges filed by the employer with a view to impugning the quality of that membership evidence, and the weight which the Board ought to place upon it. There was, in addition, a statement in opposition filed by a large number of employees in the bargaining unit. In view of the number of persons signing that statement who had previously signed membership cards upon which the applicant relies, the statement in opposition is material to the enquiry before the Board.
6. The Board ruled that it would first deal with the charges against the membership evidence filed by the employer. These had to do with the conduct of one of the applicant's major organizers in this campaign, Mr. Ed Ziemba. The charges were essentially that Mr. Ziemba brought improper considerations to bear on one Delia Reposo in attempting to persuade her to sign a membership card. Specifically, Mr. Ziemba is challenged for engaging in certain discussions with Ms. Reposo concerning the possible purchase of her car, and also the possible securing of a job for her boyfriend, Manny Frigoso, who was also present for the conversation. The employer contends that Mr. Ziemba secured an improper "conditional" payment from Ms. Reposo insofar as Ms. Reposo agreed to sign a card and pay her dollar only on the understanding that the applicant would in fact file an application for certification

with the Labour Board the next day. The Board heard the employer's evidence with respect to these charges, and issued the following oral decision.

7. The issues raised by the employer's charges bring into play two fundamental principles with respect to Board certification. The Board has many times emphasized that it requires the highest standards of integrity from individuals engaged in trade union organizing, particularly in view of the "hearsay" nature of the evidence upon which the Board must rely. On the other hand, the whole basis for the Board's acceptance of hearsay evidence in this regard is to provide objective and confidential evidence of employees' wishes, without the necessity of a full investigation into the thought process of every employee in each case. The Board must continue to supervise the organizing process carefully. However, the Board has, given the nature of that process, been reluctant to impose unrealistic standards on organizers with respect to styles or degrees of "salesmanship". The test which the Board has developed has most recently been set out and considered in the case of *Leon's Furniture* [1982] OLRB Rep. March 404, where the Board noted, at paragraph 11:

The Board has drawn the line of regulation between salesmanship and improper conduct at fundamental misrepresentation, coercion and intimidation.

Beyond that line, the Board recognizes that an employee's decision ultimately to sign a card can be the product of a number of factors, and the Board is not prepared to engage, as a general rule, in *ex post facto* analyses of what it was specifically that motivated the employee to sign in each particular case. (Compare *Baltimore Aircoil* [1982] OLRB Rep. October 1387.) In the absence of conduct that crosses the bounds of acceptable salesmanship, in other words, the card which the employee has signed is allowed to speak for itself.

8. The Board finds that Mr. Ziemba's conduct in this case did *not* cross the bounds of acceptable salesmanship. The possibility of purchasing Ms. Reposo's car, or finding a job for her boyfriend, were *not* made conditional upon Ms. Reposo signing a card, and the Board need not decide here what its response would be if they were. With respect to the car, after considerable discussion, it was Ms. Reposo's evidence that Mr. Ziemba simply told her that he would "speak to his daughter and get back to her". With respect to the job, Mr. Frigoso himself explained to Mr. Ziemba the reasons for his skepticism at Mr. Ziemba's ability to produce, and the Board finds that Mr. Ziemba undertook to do no more than to try - which he did. Neither witness, the Board finds, was under any illusion as to the extent of Mr. Ziemba's undertaking, although both were naturally hopeful that Mr. Ziemba might ultimately come through.

9. With respect to the "conditional" payment, the Board has never said that *any* kind of condition attaching to an application for membership destroys the value of that application. The cases cited by the employer all go no further than to establish that it is improper to establish a condition that the individual receive his or her dollar back if the application for certification is not successful, or, put another way, if not enough cards are obtained. That was *not* the point of the condition in this case. Mr. Ziemba in the course of his solicitation of Ms. Reposo assured her that he had enough cards already and that he did not really need her card at all. Ms. Reposo, through previous experience with organizing campaigns, believed that Mr. Ziemba was bluffing, and wanted to make it clear to him that she was not so naive. She therefore challenged him to back up his statement that he already had sufficient cards to be

certified. Mr. Ziemba responded to this challenge by indicating that he was prepared to file his application for certification with the Board the very next day. He went on to reinforce his sincerity by saying that if he failed to follow through with his undertaking, he was prepared to give Ms. Reposo her dollar back. He added that he would give Ms. Reposo this undertaking in writing, and proceeded to do so. This condition, we find, was simply a result of the sparring that was going on between the two over Mr. Ziemba's sincerity, and in any event is not inconsistent with the fundamental purpose of employees signing a card: i.e. to be used to file an application for certification with the Board. It is also a condition which would, to the employees' knowledge, be fulfilled or not well before the terminal date for indicating any change of heart by the employee.

10. Having heard the evidence, therefore, the Board can find no compelling basis to conclude other than that Ms. Reposo decided, after considerable coaxing, to voluntarily sign an application for membership, fully aware of all the material facts and what it was that she was doing. The Board finds no basis to the challenge raised against the applicant's membership evidence and will proceed to entertain the evidence concerning the statement in opposition filed in this matter.

11. There was also filed in conjunction with this organizing campaign a section 89 unfair labour practice complaint against the employer. This complaint, the Board was advised, raises a number of factual issues which may be deemed by one or the other of the parties to be relevant both to the question of the voluntariness of the petition, and, if ultimately material, to the question of the applicant's section 8 request for certification. The Board accordingly accepted the agreement of the parties to at this stage consolidate the instant certification file and the section 89 complaint, being Board file No. 0811-83-U. There was, at the same time, some discussion before the Board of the specific procedure to be adopted in dealing with the remaining issues. Noting the agreement of the parties that a different panel would be proceeding with the remainder of the issues in order to expedite scheduling, the Board at this point went no further than to indicate that the issue of the "petition" would be dealt with next, and that the proceedings will resume, therefore, with the tendering of the petitioners' evidence concerning the origination and circulation of the statement in opposition.

2413-82-M United Brotherhood of Carpenters and Joiners of America, Local Union 1669, Applicant, v. 384368 Ontario Ltd. o/a **Thunderhawk Developments**, Respondents

Construction Industry Grievance – Employer – Allegation that persons hired contrary to collective agreement – Whether respondent true employer of persons in question – Board applying test to determine employer status

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members A. Hershkovitz and J. A. Ronson

DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER A. HERSHKOVITZ; August 18, 1983

1. There have been two earlier interim decisions issued by the Board dealing with a procedural matter with respect to this referral of a grievance under section 124 of the *Labour Relations Act*.

• • • •

3. The applicant, United Brotherhood of Carpenters and Joiners of America, Local 1669, ("Local 1669") has alleged that the respondent, 384368 Ontario Ltd. o/a Thunderhawk Developments ("Thunderhawk") is bound to a collective agreement with Local 1669, has violated the hiring provision to that agreement and has failed to pay the proper wages prescribed by it. This decision deals with the single issue of whether Thunderhawk is the employer of the employees who are the subject matter of the grievance.

4. The reply filed by Thunderhawk states, in part, that it is not the general contractor on the Flinder's Park Senior Citizens Home ("the Home") which has given rise to the grievance; that Flinder's Park Senior Citizens Group Inc. ("Flinder's Park") is the owner and general contractor of the project; and that Thunderhawk only performs supervisory duties for Flinder's Park under the terms of a project manager agreement between Flinder's Park and Thunderhawk. Counsel for Thunderhawk at the hearing reiterated and elaborated on that position and contended that, while it may appear that Thunderhawk is the employer because of certain services which it has contracted to provide to Flinder's Park, the real employer is Flinder's Park. Counsel for Local 1669 took the position that Thunderhawk is not only the apparent employer, but is the real employer. Thus the issue joined before the Board is whether Thunderhawk is the employer of the persons whom Local 1669 alleges have been hired contrary to the collective agreement which it alleges is binding upon Local 1669 and Thunderhawk.

5. The Board heard the testimony of Lawrence DeGagne and Roger Dolyny. DeGagne was called by the applicant and Dolyny by the respondent. DeGagne is the president of Flinder's Park and one of its four directors. Dolyny is the owner of Thunderhawk. The findings of fact herein are made on their evidence having regard for their demeanour.

6. Flinder's Park was incorporated September 21, 1982 as a non-profit company. It was formed for the purpose of obtaining funding for the building of the Home. Four directors

carry out its business purposes . None of them have had experience with operating a business in the construction industry. Flinder's Park and Thunderhawk entered into an agreement which states that it was signed September 24th, 1982 and which contains the following provisions:

CONTRACT

Between

384368 Ontario Ltd. O/A THUNDERHAWK DEVELOPMENTS,
P.O. Box 566, Fort Frances, Ontario

and

FLINDER'S PARK SENIOR CITIZENS HOUSING GROUP INC.
P.O. Box 99, Fort Frances, Ontario

THUNDERHAWK DEVELOPMENTS agrees to provide the services necessary to the supervision of construction of a 40-unit Senior Citizens apartment complex owned by the Flinder's Park Senior Citizens Housing Group Inc. and located in the Town of Fort Frances, Ont. The FLINDER'S PARK SENIOR CITIZENS HOUSING GROUP INC. shall act as the general contractor in the project and Thunderhawk Developments shall provide the supervision necessary to the construction of the 40-unit Senior Citizens apartment complex.

Such supervisory services shall encompass the following:

1. Appointment of a project manager (namely, Roger Dolyny) for the on-site construction supervision of the project at a minimum of 8 hours per working day.
2. Provide a temporary office and storage shed on-site during the course of construction. Such facility shall be approximately 8' x 24' weathertight, equipped with a keyed lock, ventilating window, heating, and adequate lighting. Such facility shall be for the storage of materials, tools and equipment which may be damaged by weather and shall be the location of all plans, specifications, notices and construction bulletins of all types.
3. Provide an on-site telephone to be available to all personnel involved in the construction of the project.
4. Keep all wage records necessary for any labour as hired by the Flinder's Park Senior Citizens Housing Group Inc. during the construction of the project. Disburse wages accordingly.
5. Keep all necessary records as may be required by the Flinder's Park Senior Citizens Housing Group Inc. pertaining to the construction costs of the project.

6. Compile and submit any and all records of construction costs to whatever agency or representative that the Flinder's Park Senior Citizens Housing Group Inc. may designate.
7. Supervise the performance of all sub-trades or other personnel necessary to the construction of the project in the strict adherence of the drawings and specifications as set out by the engineers (Peterson, Pawliuk and Assoc. Ltd.).
8. Ensure that all sub-trades and construction personnel perform their work within the confines of all regulatory agencies codes (i.e. Ontario Dept. of Labour, Workmen's Compensation Board of Ontario, and any other federal, provincial or municipal agency).
9. Keep a daily construction log of all activities during the project.
10. Record any deviation from the plans and specifications on an "as built" set of blueprints to be presented to the Flinder's Park Senior Citizens Housing Group Inc. at project completion.
11. Take all reasonable precautions and institute any reasonable safeguard necessary for the prevention of theft of tools and materials from the project.
12. Take all reasonable precautions and institute any reasonable safeguard necessary for safety on the project.
13. Take all reasonable precautions and institute any reasonable safeguards necessary to the protection of all work that has been performed.
14. Ensure that all sub-trades and personnel perform their duties within the timeframes allowed in the construction schedule (Acts of God, strikes, or material delay excepted).
15. Any deviation from the plans and specifications by any sub-trade or other personnel in either labour or materials must be reported promptly to Peterson, Pawliuk & Assoc. Ltd., Flinder's Park Senior Citizens Housing Group Inc. and any other agency that this would involve. Such notice shall be both oral and written and shall be given to all parties concerned.
16. Thunderhawk Developments shall correlate the activities of all sub-trades, construction personnel, supervisors, inspectors and any other agency to ensure the speedy and efficient completion of the construction of the project.

Such services as listed above shall be provided by Thunderhawk Developments to the Flinder's Park Senior Citizens Housing Group Inc.

at a rate of 8% of the project cost (excluding the cost of the land and the C.M.H.C. mortgage insurance fee.) There shall be no additional charges for overtime hours by the project manager during the course of the construction of the project.

Dated at Fort Frances, Ontario, this 24th day of September, 1982.

That agreement was executed on behalf of Thunderhawk by Dolyny and on behalf of Flinder's Park by DeGagne and the three other directors.

7. Construction of the Home began on December 9, 1982, with site preparation having started in late November. Some of the work was performed by a direct-hire work force and the remainder by sub-contracting to various trade contractors. All materials were purchased directly by Flinder's Park. The employees on the direct-hire work force were supplied through the local office of The Canada Employment Immigration Commission ("Canada Employment") under the Program for the Employment-Disadvantaged. This is a program under which wage costs are subsidized by a rebate which ranges from 25% to 85% of eligible wages paid. While Dolyny testified originally that workers were supplied without any written agreement between Thunderhawk and Canada Employment, he later admitted that a written undertaking is made between Thunderhawk and the Commission with respect to each worker supplied by the Canada Employment Office for employment. The sample document tendered in evidence shows the name of the employer as Thunderhawk and is signed on behalf of the employer by Dolyny. It is dated December 3rd, 1982 and indicates the amount of subsidy which will be paid to the employer for the particular worker over a specified period of employment. The wage subsidies are paid by the Commission to Thunderhawk. By an arrangement between Thunderhawk and Flinder's Park, they are applied to reduce the wage costs of constructing the Home. Since Flinder's Park is a non-profit corporation, it is eligible for a rebate on Federal Sales Tax on all materials purchased. By making the project eligible for these two sources of rebates, Flinder's Park was able to bring the project costs within the limits which would qualify for a mortgage from The Central Mortgage and Housing Corporation ("CMHC"). This approach to constructing the Home was adopted in order to bring the costs of the project within the mortgage funding available from CMHC after two prior attempts at putting the job out for tenders had failed because the cost of constructing it by letting contracts to the lowest bidders would have been greater than the mortgage funds available through CMHC.

8. The evidence of DeGagne and Dolyny is that Flinder's Park, in order to resolve the dilemma of bringing the costs of the project within limits which would qualify it for CHMC funding, decided to build the project using a combination of a direct-hire work force, sub-contractors and purchasing all of the construction materials itself, on the expectation that Flinder's Park would qualify for wage subsidies available through federal government programs for the unemployed. They testified that Flinder's Park could not qualify for those programs because it was a non-profit corporation and the programs were available only to taxable corporations. Moreover, Flinder's Park did not qualify for a rebate of Federal Sales Tax on building materials except as a non-profit corporation. It needed these two sources of funds in order to keep the cost of the construction project within limits satisfactory to CHMC. Thunderhawk, on the other hand, was a business which would be eligible to apply under the federal government programs for the unemployed. Therefore, Flinder's Park decided and Thunderhawk agreed that Thunderhawk would enter into arrangements with the Commission to qualify for wage subsidies with the understanding that Flinder's Park would be the beneficiary of the

subsidies. Minutes of a meeting of Flinder's Park's Board of Directors held on November 30, 1982 contains the following minute:

Motion to have Project Manager, Thunderhawk Developments, put through Manpower Employment Programmes in its name because of Revenue Employer No. and set up payroll to coincide which will take advantage of grants through the Canada Manpower Programmes and protect the pending application for a non-profit Number Re: Federal Sales Tax rebate."

9. Pursuant to the arrangement between Thunderhawk and the Commission, the Canada Employment office supplied Thunderhawk with a list of available manpower together with phone numbers and other data about the persons on the list. Whenever the project required persons on a direct-hire basis, Dolyny hired from the list in order beginning with the first name. The first requirement was for six persons and Dolyny hired the first six persons on the list. The persons hired are put to work and remain employed as long as there is a need for them and they can perform the work. If an employee is unable to perform the work, he is dismissed and the next person on the list is hired. Twice monthly when Flinder's Park gets progress payments from CMHC, it puts Thunderhawk in funds sufficient to cover the payroll costs of the persons hired through the Canada Employment office. Thunderhawk pays the employees on the first and 16th of each month, withholds and remits the statutory deductions for income tax, Canada Pension Plan and unemployment insurance and makes the employer contribution required. The cheques issued to the employees are cheques of Thunderhawk and the statutory deductions and contributions are reported under Thunderhawk's name and its taxation number. According to the evidence before the Board, an employer must have such a number in order to be eligible for the wage subsidy programs. Flinder's Park did not have the requisite taxation number and DeGagne testified that the directors believed it to be ineligible for a taxation number because of its non-profit status. Thunderhawk files claims monthly with the Canada Employment office which Dolyny signs attesting to the accuracy of the hours worked which are recorded on the claim. When an employee is terminated from the project, he is issued a Record of Employment for unemployment insurance claims purposes by Thunderhawk, showing Thunderhawk as the employer. Dolyny admits that the Canada Employment office considers Thunderhawk to be the employer to whom it is referring the unemployed-disadvantaged persons and that Revenue Canada would see Thunderhawk in the same light with respect to the income tax, Canada Pension Plan and unemployment insurance remittances and contributions.

10. Dolyny assesses the work performance of the direct-hires and decides whether they are performing satisfactorily. If they are not, he advises the directors and the persons are let go. DeGagne and Dolyny each testified about one such instance involving two labourers. DeGagne testified that he thought the two labourers had been dismissed and that Dolyny had advised the board that it was necessary for him to let them go. Dolyny testified that he had advised the directors of a problem with respect to the performance of two labourers, had got the directors' authority to deal with the situation, including dismissing them if needed, and that some three weeks later he spoke to both persons about their work. At that time, he dismissed one and retained the other. The Board prefers DeGagne's evidence that Dolyny had simply told the directors what he had done.

11. Dolyny issues all of the day-to-day instructions on the project to the direct-hire em-

ployees and to the sub-contractors. He also deals directly with any building inspectors or inspectors from CMHC who visit the project site. In both respects, he keeps the Flinder's Park directors advised of what is happening on the project. This is generally done at a monthly meeting with the directors held at the project site on a set date. If problems arise between the monthly meetings, Dolyny will meet with the directors to inform and advise them and get instructions from them with respect to dealing with problems. The directors, as noted above, have no experience with the operation of construction business, nor does any of them have any experience with the supervision of construction activities. Flinder's Park has no supervision on the site other than Thunderhawk in the person of Dolyny. In fact, it has no physical presence on the site and the project secretary who works in the site office was referred to Thunderhawk for employment under the same wage subsidy programs as the other direct-hire employees.

12. Dolyny has held three job meetings with the direct-hire employees. One of these meetings was held because he found it necessary to explain to the employees that Thunderhawk was not their employer and that Flinder's Park was. According to Dolyny, this need arose when two employees who had left the project for employment elsewhere requested letters of reference from Thunderhawk as their former employer. Dolyny claims that this request caused him to realize that the employees must be confused as to the identity of the true employer.

13. Counsel for Thunderhawk contends that it has been engaged by Flinder's Park as project manager for construction of the Home; that Flinder's Park is its own general contractor and the true employer of the direct-hires on the project, not Thunderhawk. Counsel admits that Thunderhawk is the employer of record, but argues that Thunderhawk is in that position solely to assist Flinder's Park in becoming the beneficiary of wage subsidies from the federal government programs for the unemployed-disadvantaged. The question for the Board is not one of whether Thunderhawk is the project manager or the general contractor for construction of the Home, rather the question is whether Thunderhawk is the true employer of the direct-hire employees amongst whom Local 1669 claims are the persons who were hired contrary to the collective agreement which it alleges is binding on Thunderhawk and Local 1669. Whenever the Board has the task of determining which of two or more companies is the employer of a group of employees for purposes of the Act, it must look beyond the form and appearance of the relationships involved to their realities. The Board has adopted certain criteria to assist in this kind of determination. Those criteria and the manner in which they have been applied by the Board were extensively canvassed in the Board's decision in *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538. That decision adopts seven criteria which were set out in another Board decision, *York Condominium Corporation*, [1977] OLRB Rep. October 645. They are:

- (1) The party exercising direction and control over the employees performing the work. See the *Municipality of Metropolitan Toronto* case, 61 CLLC ¶16,214; the *Sentry Department Stores Limited* case [1968] OLRB Rep. Sept. 540, 546; the *Beer Precast Concrete Limited* case, [1970] OLRB Rep. May 224, 227-8; the *Belcourt Construction (Ottawa) Limited* case, [1971] OLRB Rep. June 321, 324; and the *Reid's Holdings (Belleville) Limited* case, [1972] OLRB Rep. July 753, 761.
- (2) The party bearing the burden of remuneration. See the *Municipality*

of *Metropolitan Toronto* case, *supra*; the *Goldlist Construction Limited* case, [1966] OLRB Rep. Oct. 487, 488; the *Kel Truck Services Ltd.* case, 1972 CLLC ¶16,068; and the *Templet Services* case, [1974] OLRB Rep. Sept. 606, 608.

- (3) The party imposing discipline. See the *Reid's Holdings (Belleville) Limited* case, *supra*; and the *Templet Services* case, *supra*.
- (4) The party hiring the employees. See the *Municipality of Metropolitan Toronto* case, *supra*; the *Sentry Department Stores Limited* case, *supra*; and the *Reid's Holdings (Belleville) Limited* case, *supra*.
- (5) The party with the authority to dismiss the employees. See the *Municipality of Metropolitan Toronto* case, *supra*; and the *Templet Services* case, *supra*.
- (6) The party which is perceived to be the employer by the employees. See the *Sentry Department Stores Limited* case, *supra*.
- (7) The existence of an intention to create the relationship of employer and employees. See the *Belcourt Construction (Ottawa) Limited* case, *supra*.

The Board in *Sutton Place*, *supra*, observed that those criteria were applied to the particular facts in *York Condominium* without being given any particular priority by the Board. Rather the Board came to a decision on the preponderance of evidence. The same approach was followed by the Board in *Sutton Place* to sort out the intricate corporate relationships and to decide which of several corporate entities was the employer. In contrast to *Sutton Place*, the instant case is simple and straightforward. Consequently, the task of applying the criteria to the facts is a considerably simpler and more straightforward one.

14. Six of the seven criteria point in the direction of Thunderhawk being the true employer of the direct-hire work force, the exception being item (2) above, the party bearing the burden of remuneration. It is Thunderhawk which has entered into an arrangement for the supply of the persons at issue from Canada Employment under the terms of the federal program for the unemployed-disadvantaged. Canada Employment referred a list of persons eligible under the program to Dolyny on behalf of Thunderhawk. Dolyny contacted the persons in the order listed and put them to work on the project. He alone assigned them to their work, supervised them, evaluated the quality of their work and decided whether it was acceptable. In at least one instance he terminated one worker when that person failed to shape up after his performance deficiencies were pointed out to him by Dolyny. While the Board preferred DeGagne's testimony that Dolyny simply advised the Board of his actions, even were the Board to accept Dolyny's evidence, that evidence would be entirely consistent with him effectively recommending the termination of the direct hire relationship.

15. The only direct evidence of discipline having been imposed is that with respect to Dolyny's warning of the two persons about their work performance and the subsequent dismissal of one. The fact that the Flinder's Park directors have no on-site involvement with the work at the project, however, coupled with Dolyny's role in supervising the work force and

his actions with respect to the two problem employees would make it inconsistent to conclude that Dolyny did not have the same authority with respect to discipline as he has for hiring and firing.

16. Counsel for Thunderhawk asserts that the hiring function is a cut and dried one, the inference being that no significance should be attributed to Dolyny's role in that regard. The function may be cut and dried in the sense that no initial selection of employees is possible because the persons referred by Canada Employment must be taken in the order referred. It remains, however, for Dolyny to do everything that is necessary to "hire" a person. He makes the initial contact, assigns the person to work, provides the day to day supervision, assesses the quality of his performance and decides whether it is acceptable. Therefore he does everything that is essential in putting the person to work and deciding whether he will be kept at work. While according to Dolyny's evidence, the program under which these persons are supplied appears not to permit any selection of who will go to work, there is no compulsion to retain them if they do not perform satisfactorily. Dolyny makes that assessment.

17. There is not a shred of doubt that the employees perceived Thunderhawk to be their employer, so much so that Dolyny claims to have found it necessary to call a site meeting of the direct-hire workers to deal with what he terms their misconception. This is not a situation where the employees' perceptions run counter to other indicators that a different entity is their true employer, as was the case in *Sutton Place, supra*. The employees herein were referred by the Canada Employment Office to Dolyny for work with Thunderhawk, their pay cheques were Thunderhawk's and, when two employees left the project, their Record of Employment forms showed Thunderhawk as their employer. There is no evidence that, prior to the meeting, any of the employees were told that Thunderhawk was not their employer or that Flinder's Park was. It was Dolyny and not one of the Flinder's Park directors who sought to change the employees' perceptions. In these particular circumstances, the employees' perceptions that Thunderhawk is their employer are wholly consistent with the other indicia of the employer-employee relationship.

18. There is no doubt either that, at least insofar as the program for the unemployed-disadvantaged is concerned, it was intended to create the relationship of employer and employees between Thunderhawk and the direct-hire employees on the Home project. That does not necessarily create an employer-employee relationship for purposes of the *Labour Relations Act*. Nor does Thunderhawk's assertion that it was thrust into the relationship in order to allow its client to benefit from the wage subsidies payable under the program insulate it from being placed in the relationship of the employer of the employees in question for purposes of the Act. The stated reason why Thunderhawk put itself forward as the employer of record standing alone does not support a conclusion that it is not the employer for purposes of the Act. Hypothetically, it could lend some credence to other, more convincing evidence that Thunderhawk was not the true employer, or serve to tip the scales in that direction where the evidence is otherwise in balance. In any event, that is far from the case here. There is little evidence in terms of what is actually taking place with respect to the employment relationship of the direct-hire employees which points to Thunderhawk *not* being the true employer. On the other hand there are compelling indications that it is. The fact that it is the employer of record, while not conclusive by itself of an employer-employee relationship for purposes of the Act, does point in that direction. Therefore, coupled with the other indicators, it is a positive indication of an employer-employee relationship.

19. The Board has found that Flinder's Park puts Thunderhawk in funds twice monthly so that it can meet the payroll for the direct hires. While the Board has little doubt that Thunderhawk is the party to whom the employees who are on its payroll would look to rectify any error in pay or any failure to pay wages owing and to whom Revenue Canada would look for the proper deduction and remittance of income tax deductions and Canada Pension Plan and unemployment insurance deductions and contributions, the mechanics of the funding of the payroll satisfy the Board that Flinder's Park has by that arrangement, undertaken the ultimate burden for Thunderhawk's payroll costs.

20. All other indicia of the employment relationship point to Thunderhawk being the employer of the direct-hire work force on the Home construction project. Therefore, whatever relationship Flinder's Park and Thunderhawk sought to create by means of the contract between them, on the facts before the Board, it finds that Thunderhawk is the employer of the direct-hire work force on the Home construction project for purposes of the *Labour Relations Act*.

21. Accordingly, the Board directs the Registrar to list this application for hearing for the purpose of hearing the evidence and representations of the parties on the remaining issues, including whether Thunderhawk and Local 1669 are bound to a current collective agreement.

0339-83-OH Isaiah Argunen, Complainant, v. **Wheeler Metal Products Ltd.**, Respondent

Health and Safety – Refusal to operate grinder – Discomfort because of grievor's allergic conditions – Refusal section not intended to apply where person not physically suited to job – No “danger” established – Dismissal not unlawful

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members F. W. Murray and S. Cooke.

APPEARANCES: *Isaiah Argunen on his own behalf; Jack Wheeler for the respondent.*

DECISION OF THE BOARD; August 12, 1983

1. This is an application pursuant to section 24 of the *Occupational Health and Safety Act* alleging breach of sections 23, 24 and 14(2)(g).

2. On the day of the hearing, June 15, 1983, the Board heard Mr. Argunen particularize his complete case by way of opening statement to determine whether there was any arguable case which the respondent was required to meet. The board unanimously decided that the applicant did not have an arguable case. Our ruling was announced and explained to the applicant. Our ruling was based on the assumption that the applicant could and would succeed in proving all of the facts he asserted. No facts from the respondent were considered except those parts of its letter of June 6th with which the applicant took no issue.

3. Sections 23(3), section 24(1) and 14(2)(g) provide:

23 (3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
- (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

24 (1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

14 (2) Without limiting the strict duty imposed by subsection (1), an employer shall,

- (g) take every precaution reasonable in the circumstances for the protection of a worker.

4. The applicant failed to show us that the circumstances which existed when he performed one aspect of his job as a labourer “endangered” him. He stated that he expected his fellow employees to be assigned the particular duty (working on a grinder with an emory cloth instead of a stone) but that he himself could refuse to do it because of certain allergic reactions (which he described as “cold-like” symptoms) which he experienced after using the machine. The Board found that the applicant had not produced the kind of evidence which could raise an arguable case that a reasonable employee could perceive a danger to himself in the circumstances. Mr. Argunen suffered discomfort and inconvenience but this did not constitute “a danger”. Also, it was clear that Mr. Argunen was exceptional in his reactions. The documents he produced indicated that the work place generally did not present a health hazard. He did not argue that the work place or the particular work he was refusing presented a hazard to all. On the evidence he could produce we found that he could not have had reason

to believe he was in danger as a result of performing work on the grinder. We also found that Mr. Argunen did not take all the necessary steps to try to keep his job and put himself in a position to perform all aspects of it. He indicated that he had asked for a face mask once at the time of his refusal to work on the grinder. He received no response to his request. Over a period of some four days between the date of his work refusal (and request to have a face mask) during which time he knew clearly he was going to be terminated because of his inability to do all the aspects of his job, he never asked again that he try the job with a mask. He simply worked his time out without trying to pursue a means (he knew was available) to put himself in a position to do his total job. For all those reasons we found he had not made out a *prima facie* case that he had reason to believe he was likely to be "endangered" by performing the grinding function. Section 23 was intended to provide a remedy for workers in danger not for those who were physically unsuited to a job which upon reasonable evaluation presented no problems to other workers. Since he has not brought himself within section 23(3) of the Act, he was not discharged because he was acting in compliance with the Act contrary to section 24. His discharge was effected because he could not or would not perform his full range of duties.

5. In connection with his allegations that section 14(2)(g) of the Act has been breached, assuming without finding that this Board has jurisdiction generally to deal with all breaches of the Act pursuant to powers granted to it in section 24(3), the applicant could not establish that the employer did not take every precaution reasonable in the circumstances for the protection of the workers. We have found that on the basis of the extensive investigations and reports from the Industrial Health and Safety Branch of the Ministry of Labour, all of which were filed with us by the applicant, there was no need for protection generally because no hazards were found to exist. Even if Mr. Argunen needed special protection, i.e., a face mask, he did not give the employer a fair opportunity to provide such protection. An employee cannot stand by and let the days until termination slip by without reiterating a request which could have been not heard and without inquiring why there was no response.

6. For all these reasons the Board dismissed Mr. Argunen's complaint.

CASE LISTINGS JULY 1983

	Page
1. Applications for Certification	
(a) Bargaining Agents Certified	157
(b) Applications Dismissed	162
(c) Applications Withdrawn	165
2. Applications for Declaration of Related Employer	166
3. Sale of a Business	166
4. Union Successor Rights	167
5. Applications for Declaration Terminating Bargaining Rights	167
6. Referral as to Appointment of Conciliation Officer	167
7. Applications for Declaration of Unlawful Strike – Construction Industry	167
8. Complaints of Unfair Labour Practice	168
9. Applications for Consent to Early Termination of Collective Agreement	171
10. Financial Statement	171
11. Jurisdictional Dispute	171
12. Applications for Determination of Employee Status	172
13. Construction Industry Grievances	172
14. Applications for Reconsideration of Board's Decision	176

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1983

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1803-82-R: Ontario Public Service Employees' Union, (Applicant) v. The Board of Education for the City of Toronto, (Respondents) v. The Federation of Women Teachers Associations of Ontario, (Intervener #1) v. Ontario Secondary School Teachers' Federation District 15, (Intervener #2) v. Canadian Union of Public Employees, (Intervener #3) v. Ontario Public School Teachers' Federation, (Intervener #4) v. Group of Employees, (Objectors).

Unit #1: "all occasional teachers employed by the respondent in its elementary panel in the City of Toronto, save and except persons covered by subsisting collective agreements." (14 employees in unit).

Unit #2: "all occasional teachers employed by the respondent in its secondary panel in the City of Toronto, save and except persons covered by subsisting collective agreements." (14 employees in unit).

2605-82-R: Labourers' International Union of North America, Local 607, (Applicant) v. Thunderhawk Developments, (Respondent) v. United Brotherhood of Carpenters and Joiners of America Local 1669, (Intervener).

Unit #1: "all construction labourers in the employ of Thunderhawk Developments in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in unit).

Unit #2: "all construction labourers in the employ of Thunderhawk Developments in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in unit).

2755-82-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Canparts Automotive International Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (82 employees in unit). (*Having regard to the agreement of the parties.*).

2768-82-R: United Cement, Lime, Gypsum and Allied Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Lake Ontario Cement Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent employed at its premises in the Township of Sophiasburgh in the County of Prince Edward save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, secretary to the plant manager, secretary to the vice-president, personnel assistant, engineering and technical staff and senior accountant." (1500 employees in unit). (*Having regard to the agreement of the parties.*).

0092-83-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. J. A. Wilson Display Ltd., (Respondent).

Unit: "all employees of the respondent employed in the City of Ottawa, save and except foremen, persons above the rank of foreman, office and sales staff." (102 employees in unit).

0356-83-R: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, (Applicant) v. Siljub Investments Limited carrying on business as Miss Ottawa Motel, (Respondent) v. Group of Employees, (Objectors).

Unit #1: (*See Applications for Certification Dismissed Subsequent to a Post Hearing Vote*).

Unit #2: "all employees regularly employed for not more than twenty-four hours per week by the respondent in Gloucester save and except managers and persons above the rank of manager." (8 employees in unit). (*Having regard to the agreement of the parties*).

0406-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Granzotto Mechanical Inc., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent in Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0426-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Burlington Mechanical Installations Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of foreman." (2 employees in unit).

Unit #2: "all employees of the respondent in Metropolitan Toronto, the Regional Municipalities of Peel and York the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0481-83-R: Retail Clerks' Union, Local 409, (Applicant) v. Economy Supermarket (Dryden) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: (*See Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

Unit #2: "all employees of the respondent in the Town of Dryden regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except manager, assistant manager, and office bookkeeper." (6 employees in unit).

0526-83-R: International Molders & Allied Trades Union, (Applicant) v. Clawsey-Sohrt Manufacturing Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (20 employees in unit.) (*Having regard to the agreement of the parties.*) (*Clarity Note*).

0539-83-R: United Steelworkers of America, (Applicant) v. Load Lifter Manufacturing Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent company in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (7 employees in unit.) (*Having regard to the agreement of the parties.*)

0583-83-R: Labourers' International Union of North America, Local 607, (Applicant) v. Brown & Root Ltd., (Respondent).

Unit #1: "all construction labourers' in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

0595-83-R: Health, Office & Professional Employees, Division of Retail, Commercial & Industrial Union, Local 206, Chartered by the United Food and Commercial Workers International Union, (Applicant) v. Oxford Lodge, (Respondent).

Unit #1: "all employees of the respondent in the City of Guelph, Ontario, save and except department heads and supervisors, persons above the rank of department head and supervisor, office and clerical employees, registered and graduate nurses, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (4 employees in unit.) (*Having regard to the agreement of the parties.*)

Unit #2: "all employees of the respondent in the City of Guelph, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department heads and supervisors, persons above the rank of department head and supervisor, office and clerical employees and registered and graduate nurses." (16 employees in unit.) (*Having regard to the agreement of the parties.*)

0629-83-R: Graphic Arts International Union, Local 211, (Applicant) v. General Printers, a Division of Cairn Capital Limited, (Respondent).

Unit: "all plant employees of the respondent in the City of Oshawa, Ontario, save and except supervisors or foremen, persons above the rank of supervisor or foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (116 employees in unit.) (*Having regard to the agreement of the parties.*)

0684-83-R: United Steelworkers of America, (Applicant) v. Continental Group of Canada Ltd., (Respondent).

Unit: "all employees of the respondent at its Fenmar Drive plant in the Municipality of Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (5 employees in unit.) (*Having regard to the agreement of the parties.*)

0711-83-R: Local #1 Ontario-International Union of Bricklayers & Allied Craftsmen, (Applicant) v. Comin Masonry Limited, (Respondent).

Unit #1: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Unit #2: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, as well as in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial, and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

0755-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. The Foundation Company of Canada Limited, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foreman." (2 employees in unit.)

0779-83-R: Ironworkers District Council of Ontario, (Applicant) v. Rex Forming Ltd., (Respondent).

Unit #1: "all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit.)

Unit #2: "all reinforcing rodmen in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0787-83-R: Ontario Public Service Employees Union, (Applicant) v. The Clarendon Foundation, (Cheshire Home) Inc., (Respondent).

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except staff supervisors and persons above the rank of staff supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (17 employees in unit). (*Having regard to the agreement of the parties.*)

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except staff supervisors and persons above the rank of staff supervisor." (3 employees in unit). (*Having regard to the agreement of the parties.*)

0805-83-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Humpty Dumpty Foods Limited, (Respondent).

Unit: "all route salesman of the respondent working at or out of Waterloo, Ontario save and except sales supervisor and those above the rank of sales supervisor and office staff." (6 employees in unit). (*Having regard to the agreement of the parties*).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0263-83-R: Energy and Chemical Workers Union, (Applicant) v. Roxul Company (A Division of Standard Industries Ltd.), (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener).

Unit: "all employees of the respondent at its plant at 551 Harrop Drive, Milton, Ontario, save and except foreman, persons above the rank of foreman, watchmen, technical staff, office and sales staff." (41 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		41
Number of persons who cast ballots	36	
Number of ballots marked in favour of applicant		31
Number of ballots marked in favour of intervener		5

0407-83-R: Energy and Chemical Workers Union, CLC, (Applicant) v. Stanley Structures Ltd., (Respondent) v. United Cement, Lime, Gypsum and Allied Workers International Union AFL-CIO-CLC, (Intervener).

Unit: "all employees of the respondent at its plant in Belleville, save and except foremen, persons above the rank of foreman, working supervisors and office staff." (135 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		134
Number of persons who cast ballots	72	
Number of ballots marked in favour of applicant		64
Number of ballots marked in favour of intervener		8

0578-83-R: United Headwear, Optical and Allied Workers Union of Canada, Local 3, (Applicant) v. Biltmore/Stetson (Canada) Inc., (Respondent) v. Hat Workers Union Local 82, of the United Hatters, Cap and Millinery Workers International Union, (Intervener).

Unit: "all employees of the respondent employed in the Municipality of Guelph, save and except foremen, persons above the rank of foreman, truck drivers, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (75 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		76
Number of persons who cast ballots	70	
Number of spoiled ballots		3
Number of ballots marked in favour of applicant		63
Number of ballots marked in favour of intervener		4

0636-83-R: United Headwear, Optical and Allied Workers Union of Canada, Local 4, (Applicant) v. Aoco Limited/Limitee, (Respondent).

Unit: "all employees of the respondent at its Branch at 62 Overlea Blvd. in Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, students employed during the school vacation period and part-time employees working less than 20 hours per

week (not more than 10% of the work force).'' (28 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		28
Number of persons who cast ballots	25	
Number of ballots marked in favour of applicant		25
Number of ballots marked in favour of Optical Plastic Technicians & Allied Workers Union, Local 67 of U.H.C. & M.W.I.U. - C.L.C.		0

Bargaining Agents Certified Subsequent to a Post Hearing Vote

2385-82-R: Retail, Wholesale, and Department Store Union, AFL:CIO:CLC, (Applicant) v. Morton Tobacco Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Windsor, save and except managers, persons above the rank of manager and office staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		15
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		7

0520-83-R: Local 200 of the Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Glassec Industries Inc./Industries Glassec Inc., (Respondent) v. Amalgamated Clothing and Textile Workers Union, Local 1649-F, (Intervener).

Unit: "all employees of the respondent in the City of Cornwall, save and except foremen and foreladies, persons above the rank of foreman or forelady, office and sales staff, uniformed guards, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (10 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		11
Number of ballots marked in favour of intervener		0

Applications for Certification Dismissed - No Vote Conducted

2581-82-R: The International Union of Bricklayers and Allied Craftsmen, Local 12, (Applicant) v. Frank Kroetsch Construction Consulting Limited, (Respondent). (2 employees in unit).

2717-82-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Applicant) v. Consolidated Maintenance Services Limited, (Respondent). (12 employees in unit).

0699-83-R: International Union of Bricklayers & Allied Craftsmen Local 23 Sarnia, Ontario, (Applicant) v. Sarnia Christian School Building Fund, (Respondent). (4 employees in unit).

0730-83-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. The Board of Education of the City of Toronto, (Respondent) v. Employee, (Objector). (68 employees in unit).

0762-83-R: Service Employees' Union, Local 478, (Applicant) v. ARC Industries, (Respondent). (13 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0477-83-R: International Woodworkers of America, (Applicant) v. Halsey Originals Inc., (Respondent).

Unit: "all employees of the respondent in the Town of Halton Hills, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (57 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		59
Number of persons who cast ballots	48	
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		30
Ballots segregated and not counted		9

0493-83-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Picker International Canada Inc., (Respondent).

Unit: "all employees of the respondent in the City of Brampton, save and except supervisors, those above the rank of supervisor, office, clerical, sales, service, and engineering staff, and students engaged in connection with a co-operative training programme." (150 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		147
Number of persons who cast ballots	142	
Number of ballots marked in favour of applicant		36
Number of ballots marked against applicant		106

0523-83-R: Textile Processors, Service Trades, Health Care Professional and Technical Employees International Union, Local 351, (Applicant) v. Windsor Arms Hotel Limited, (Respondent) v. Food and Service Workers of Canada, (Intervener).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto employed at the Windsor Arms Hotel, Noodles, and the Bay Street Car, save and except supervisor, office staff, musicians, maitres d'hotel, captain waiter chefs, sous-chefs, chefs de partie who exercise managerial functions, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, and employees covered by a subsisting collective agreement between the respondent and Local 280 of the International Beverage Dispensers and Bartenders Union of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F. of L., C.I.O., C.L.C." (194 employees in unit).

Number of names of persons on revised voters' list		148
Number of persons who cast ballots	112	
Number of spoiled ballots		5
Number of ballots marked in favour of applicant		32
Number of ballots marked in favour of intervener		72
Ballots segregated and not counted		3

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2699-82-R: United Food and Commercial Workers International Union AFL-CIO-CLC, (Applicant) v. Krinos Foods Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the town of Vaughn, save and except foremen, persons above the rank of foreman, office and sales staff." (22 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		21
Number of persons who cast ballots	21	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		12
Ballots segregated and not counted		4

2737-82-R: United Steelworkers of America, (Applicant) v. Canadian Thermos Products Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except superintendents, persons above the rank of superintendent, office and sales staff." (124 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		121
Number of persons who cast ballots	106	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		32
Number of ballots marked against applicant		57
Ballots segregated and not counted		16

0280-83-R: The Canadian Union of Public Employees, (Applicant) v. Pine Valley Rest Home, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor, save and except administrator and co-ordinator, persons above the rank of administrator and co-ordinator and registered and graduate nurses." (19 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		13
Number of names of persons on revised voters' list		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		7

0356-83-R: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, (Applicant) v. Siljub Investments Limited carrying on business as Miss Ottawa Motel, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in Gloucester save and except managers, persons above the rank of manager and persons regularly employed for not more than twenty-four hours per week." (9 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Bargaining Agents Certified - No Vote Conducted*).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		4

0356-83-R: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Ottawa, (Applicant) v. Siljub Investments Limited carrying on business as Miss Ottawa Motel, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in Gloucester, save and except managers, persons above the rank of manager and persons regularly employed for not more than twenty-four hours per week." (8 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Bargaining Agents Certified – No Vote Conducted*).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		4

0481-83-R: Retail Clerks' Union, Local 409, (Applicant) v. Economy Supermarket (Dryden) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: #1: "all employees of the respondent in the Town of Dryden, save and except manager, assistant manager, meat manager, office bookkeeper, persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (14 employees in unit). (*Having regard to the partial agreement of the parties*).

Unit #2: (*See Bargaining Agents Certified – No Vote Conducted*).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		11

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1493-82-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Teperman and Sons Limited, (Respondent).

2225-82-R: Ironworkers District Council of Ontario, (Applicant) v. Price Waterhouse Ltd., (Respondent).

0398-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. James Giroux Contracting, (Respondent).

0567-83-R: Retail, Commercial & Industrial Union, Local 206 Chartered by the United Food & Commercial Workers International Union, (Applicant) v. K-W Food Services Ltd., (Respondent).

0655-83-R: United Steelworkers of America, (Applicant) v. H. R. Radomski & Co. Ltd., Ardex Division, (Respondent).

0690-83-R: Labourers' International Union of North America, Ontario Provincial District Council, Local 1059, (Applicant) v. Robuck Contracting Limited, (Respondent).

0692-83-R: Retail Clerks' Union, Local 409, (Applicant) v. Birchwood Terrace Nursing Home and Menistic Manor Nursing Home, (Respondent).

0712-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Investments Carpentry, Division of 399480 Ontario Limited, (Respondent).

0713-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. M and B Carpentry, (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1190, (Intervener).

0764-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. F. E. D. Construction, (Respondent).

0834-83-R: International Union of Bricklayers and Allied Craftsmen, Local 1, (Applicant) v. Fraccioni & Defaveri Mansory Contractors Ltd., (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1723-82-R: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Price Waterhouse Limited and Canadian Imperial Bank of Commerce, (Respondents). (*Dismissed*).

2303-82-R United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Metro Century Construction Ltd. and Chartex Construction Ltd. and C. Mady Leaseholds Ltd., (Respondents). (*Dismissed*).

SALE OF A BUSINESS

1675-82-R: London & District Service Workers' Union, Local 220, AFL, CIO, CLC, (Applicant) v. Price Waterhouse Limited and The Maritime Life Assurance Company, (Respondents). (*Dismissed*).

1723-82-R: London & District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Price Waterhouse Limited and Canadian Imperial Bank of Commerce, (Respondents). (*Dismissed*).

2283-82-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Laidlaw Transportation Limited and Laidlaw Waste Systems Ltd., (Respondents). (*Dismissed*).

2304-82-R: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Metro Century Construction Ltd. and Chartex Construction Ltd. and C. Mady Leaseholds Ltd., (Respondents). (*Dismissed*).

0338-83-R: Public Service Alliance of Canada, (Applicant) v. con/ex general contractors Division of 450318 Ontario Ltd., (Respondent). (*Dismissed*).

0445-83-R: Ontario Public Service Employees' Union, (Applicant) v. Whitby-Bowmanville Ambulance Service, (Respondent). (*Granted*).

0648-83-R: International Beverage Dispensers' & Bartenders' Union, Local 280, (Applicant) v. Vivace Tavern Inc., (Respondent). (*Granted*).

0657-83-R: Millworkers Local #802 – United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Martindale Windows Inc., (Respondent). (*Withdrawn*).

UNION SUCCESSOR RIGHTS

0115-83-R: International Association of Machinists and Aerospace Workers, (Applicant) v. Jaeger Machine Company of Canada Ltd., (Respondent) v. Jaeger Employees' Union, (Predecessor Trade Union) v. D. Moyes, (Objector). (*Granted*).

APPLICATION FOR DECLARATION TERMINATING BARGAINING RIGHTS

0448-83-R: Harold Fairweather, (Applicant) v. Canadian Union of Public Employees, (Respondent) v. Salvation Army House of Concord, (Intervener). (9 employees in unit). (*Dismissed*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

2498-82-M Sperry Vickers Division Sperry Inc. Canada, (Employer) v. International Association of Machinists and Aerospace Workers, District Lodge 717, (Trade Union). (*Granted*).

0068-83-M: Rantex Brushes Inc., (Employer) v. United Electrical, Radio & Machine Workers of America, Local 542, (Trade Union). (*Granted*).

0409-83-M: National Elevator and Escalator Association, (Employer) v. International Union of Elevator Constructors, Local 96, (Trade Union). (*Dismissed*).

0510-83-M: Total Food Systems Limited, (Employer) v. Hotel, Restaurant & Cafeteria Employees' Union, Local 75, (Trade Union). (*Terminated*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0804-83-U: The Presidential Group (Brookshire) Limited, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent). (*Withdrawn*).

0896-83-U: Cliffside Pipelayers, A Division of Banister Continental Ltd., (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and its Local Union 46, William Weathercup, Lyle Charron, Ollaca Desjardine, John Moore, Mario Alulio, Doug Miller, (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

0037-83-U: Public Service Alliance of Canada, (Applicant) v. con/ex general contractors Division of 450318 Ontario Ltd., (Respondent). (*Dismissed*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1278-82-U: Joe Portiss, (Complainant) v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, (Respondents). (*Granted*).

1719-82-U: United Rubber, Cork, Linoleum and Plastic Workers of America, A.F.L. - C.I.O. - C.L.C., (Complainant) v. Space Circuits Limited, (Respondent). (*Dismissed*).

1873-82-U: United Food and Commercial Workers' International Union, Local 725, (Complainant) v. Mmmuffins Inc., (Respondent). (*Withdrawn*).

2191-82-U: International Union of Elevator Constructors and its Local 90, (Complainant) v. Westinghouse Canada Limited, (Respondent). (*Terminated*).

2604-82-U: Labourers' International Union of North America, Local 607, (Complainant) v. Thunderhawk Developments (384368 Ontario Limited) and Roger Dolyny, (Respondent). (*Granted*).

2715-82-U: Keith MacLeod Sutherland, (Complainant) v. Labourers' International Union of North America, Labourers' International Union of North America, Local 493, Angelo Fosco, A. E. Coia, M. A. Ross, and G. Mullen, (Respondents). (*Dismissed*).

2754-82-U: Service Employees' Union Local 532, (Complainant) v. St. Elizabeth Home Society, (Respondent). (*Withdrawn*).

0014-83-U; 0015-83-U; 0016-83-U; 0017-83-U: Keith MacLeod Sutherland, (Complainant) v. Labourers' International Union of North America, Labourers' International Union of North America Local 493, Angelo Fosco, A. E. Coia, M. A. Ross, and G. Mullen, (Respondents). (*Dismissed*).

0101-83-U: The Public Service Alliance of Canada, (Complainant) v. William Graves, Gordon Johnson and Henry Hof, (Respondents) v. con/ex general contractors Division of 450318 Ontario Ltd., (Intervener). (*Dismissed*).

0102-83-U: The Public Service Alliance of Canada, (Complainant) v. con/ex general contractors Division of 450318 Ontario Ltd., (Respondent). (*Dismissed*).

0271-83-U; 0272-83-U; 0273-83-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Canparts Automotive International Ltd., (Respondent). (*Withdrawn*).

0296-83-U: Terry Davey, (Complainant) v. Canadian Union of Public Employees, Local 16, (Respondent). (*Granted*).

0306-83-U: Teamsters, Chauffeurs, Warehousemen and

Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Ambassador Building Maintenance Limited, (Respondent). (*Withdrawn*).

0310-83-U: Upholsterers' International Union of North America, (Complainant) v. Bedford Bedding & Upholstery Co. Ltd., (Respondent). (*Withdrawn*).

0319-83-U: John Farnum, (Complainant) v. McDonnell Douglas, (Respondent). (*Withdrawn*).

0334-83-U: Roy Smith, (Complainant) v. The United Steelworkers of America, (Local 8483), (Respondent). (*Withdrawn*).

0362-83-U: Upholsterers' International Union of North America, (Complainant) v. Bedford Bedding & Upholstery Co. Ltd., (Respondent). (*Withdrawn*).

0363-83-U: Keith MacLeod Sutherland, (Complainant) v. Labourers' International Union of North America, Labourers' International Union of North America, Local 493, Angelo Fosco, A. E. Coia, M. A. Ross, and G. Mullen, (Respondents). (*Dismissed*).

0408-83-U: Local 280, International Beverage Dispensers' and Bartenders' Union, (Complainant) v. Ramada 400/401, (Respondent). (*Dismissed*).

0453-83-U: William Nikita, (Complainant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Local 880, (Respondent) v. Premier Concrete, (Intervener). (*Dismissed*).

0485-83-U: Anica Popic, (Complainant) v. The Canadian Union of Blind & Sighted Merchants and CNIR CaterPlan Services, (Respondents). (*Withdrawn*).

0486-83-U: Richard Noel, (Complainant) v. Aluminum Brick & Glass Workers, Local 237G, (Respondent). (*Withdrawn*).

0494-83-U: Labourers' International Union of North America, Local 183, (Complainant) v. York Condominium Corporation No. 289, (Respondent). (*Withdrawn*).

0498-83-U: Service Employees International Union, Local 183, (Complainant) v. J. H. MacFarland Memorial Home for the Aged, (Respondent). (*Withdrawn*).

0508-83-U: Retail Clerks Union, Local 409, (Complainant) v. Northwest Merchants Ltd. Canada, Gerald Robert Knowbel and Janice Eilene Kowbel, (Respondent). (*Granted*).

0531-83-U: Retail Clerks Union, Local 409, (Applicant) v. White Otter Inns Limited, (Respondent). (*Withdrawn*).

0532-83-U: Retail Clerks Union, Local 409, (Complainant) v. White Otter Inns Limited, (Respondent). (*Granted*).

0546-83-U: Alliance Employees' Union, (Complainant) v. Taxation Component, P.S.A.C., (Respondent). (*Withdrawn*).

0557-83-U: Food and Service Workers of Canada, (Complainant) v. Chrysalis Restaurant Enterprises Inc., (Toronto, Ont.), (Respondent). (*Terminated*).

0568-83-U: Retail, Commercial & Industrial Union, Local 206, Chartered by the United Food & Commercial Workers International Union, (Complainant) v. K-W Food Services Ltd., (Respondent) v. Retail, Wholesale and Department Store Union, (Intervener). (*Withdrawn*).

0592-83-U: Shiraz Asser, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW – CLC), Local 1967, (Respondent) v. McDonnell Douglas Canada Ltd., (Intervener). (*Dismissed*).

0593-83-U: Michael Bruen, (Complainant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (UAW), (Respondent). (*Dismissed*).

0602-83-U: Gus Landry, Terry Bruchman, Alp Weber, Tim Campbell, Tony Mendes, Rick Pearson, (Complainant) v. J.M. Schneiders & S.E.A, (Respondent). (*Withdrawn*).

0607-83-U: S. George Vizino, (Complainant) v. Kwikasair Express, (Respondent). (*Withdrawn*).

0608-83-U: Canadian Union of Public Employees and its Local 3030, (Complainant) v. Casselman Nursing Home, owned and operated by Elsie Able Enterprises Limited, (Respondent). (*Withdrawn*).

0612-83-U: Jan Kwast, (Complainant) v. Amalgamated Transit Union Div. 113, (Respondent). (*Dismissed*).

0617-83-U: United Steelworkers of America, (Complainant) v. Northern Plastics Ltd., (Respondent). (*Withdrawn*).

0640-83-U: Labourers' International Union of North America, Local 183, (Complainant) v. York Condominium Corporation 365, (Respondent). (*Withdrawn*).

0647-83-U: Food and Service Workers of Canada, (Complainant) v. Chrysalis Restaurant Enterprises Inc., (Toronto), (Respondent). (*Withdrawn*).

0649-83-U: Maria E. C. Van Der Voort, (Complainant) v. West Park Hospital and Alan Edge, (Respondents). (*Withdrawn*).

0654-83-U: Ontario Public Service Employees' Union, (Complainant) v. Clarendon Foundation, (Respondent). (*Withdrawn*).

0668-83-U: Ronald Mariash, (Complainant) v. Walter Bochenuk, (Respondent). (*Withdrawn*).

0669-83-U: Ronald Mariash, (Complainant) v. Peter Douglas, (Respondent). (*Withdrawn*).

0670-83-U: Ronald Mariash, (Complainant) v. Brian Pinto, General Manager, DARTS, (Respondent) v. Ulrich Venohr, President, Local 839, CUPE, (Intervener). (*Withdrawn*).

0671-83-U: Ronald Mariash, (Complainant) v. Morris Hendershot, (Respondent). (*Withdrawn*).

0691-83-U: Office & Professional Employees International Union, Local 343, (Complainant) v. The United Brotherhood of Carpenters and Joiners of America, Local Union 2679, (Respondent). (*Withdrawn*).

0693-83-U: Adao Dacunha, (Complainant) v. Hotel, Restaurant & Cafeteria Employees' Union, Local 75, (Respondent). (*Withdrawn*).

0709-83-U: United Food and Commercial Workers International Union, Local 1105P, (Complainant) v. Saville Food Products Incorporated, (Respondent). (*Withdrawn*).

0734-83-U: Sebert A. Hines, (Complainant) v. International Association of Machinists and Aerospace Workers, District Lodge No. 717, Bob McMillan, (Respondent). (*Withdrawn*).

0742-83-U: Sandra Louise Barber, Executrix of the Estate of Max Ross Barber, (Complainant) v. Teamsters Union Local 141, (Respondent). (*Withdrawn*).

0743-83-U: Kathy Flaherty, (Complainant) v. Canadian Textile and Chemical Union, (Local 520), (Respondent). (*Withdrawn*).

0813-83-U: Service Employees' International Union, Local 183, (Complainant) v. Rickarton Hotel—554663 Ontario Limited, (Respondent). (*Withdrawn*).

0826-83-U: Willi E. B. Wald, (Complainant) v. American Can Co. of Canada, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0631-83-M: Franklin Prouse Motors (1962) Ltd., (Applicant) v. International Association of Machinists and Aerospace Workers and its Automotive Lodge 2332, (Respondent). (*Granted*).

0698-83-M: Work Wear Corporation of Canada Ltd. (Anchor Textiles Division), (Employer) v. Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351, (Respondent). (*Granted*).

0726-83-M: Amoco Fabrics Ltd., (Employer) v. Amalgamated Clothing & Textile Workers' Union, Local 2412, (Trade Union). (*Granted*).

FINANCIAL STATEMENT

2293-82-M: Irene Bovay, (Complainant) v. Canadian Union of Public Employees, (Respondent). (*Withdrawn*).

0543-83-M: Frank Manoni, (Complainant) v. Labourers' International Union of North America, Local 527, (Respondent). (*Withdrawn*).

JURISDICTIONAL DISPUTES

1013-82-JD: United Brotherhood of Carpenters and Joiners of America, Local No. 446, (Complainant) v. Stone & Webster Canada Ltd.; and International Association of Bridge Structural and Ornamental Iron Workers, Local 786, (Respondents). (*Withdrawn*).

0048-83-JD: Edland Building Systems Ontario Limited, (Complainant) v. Sheet Metal Workers' International Association, Local 537, and International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 736, (Respondent). (*Withdrawn*).

0501-83-JD: N. Ghermeck, and M. Cochrane, et al, (Complainant) v. Teamsters Local 230 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Dufferin Concrete Products Toronto Division, (Respondents). (*Dismissed*).

0545-83-JD: The International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 736, (Complainant) v. State Contractors Inc., (Respondent) v. The Millwright District Council of Ontario, and Millwright Local 1916, (Intervenors). (*Dismissed*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0489-83-M: Canadian Union of Public Employees and its Local 752, (Applicant) v. The Township of Atikokan, (Respondent). (*Withdrawn*).

0643-83-M: Canadian Union of Public Employees, Local 1483A, (Applicant) v. Trans-help of the Regional Municipality of Peel, (Respondent). (*Dismissed*).

0666-83-M: The Canadian Union of Public Employees, Local 73, (Applicant) v. The Corporation of the Town of Halton Hills, (Respondent). (*Dismissed*).

CONSTRUCTION INDUSTRY GRIEVANCES

0011-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Inducon Development Corporation, Inducon Construction (Northern) Inc., and Inducon Design/Build Associates, (Respondents). (*Granted*).

2192-82-M: International Union of Elevator Constructors and its Local 90, (Applicant) v. Westinghouse Canada Limited, (Respondent). (*Granted*).

2301-82-M: The International Brotherhood of Electrical Workers, Local Union 1788, (Applicant) v. Ontario Hydro, (Respondent) v. Greg M. Nelson, W. K. Luoma, and J. D. Boyd, (Intervenors). (*Withdrawn*).

2459-82-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Joe Arban Contractor Limited, (Respondent). (*Granted*).

2470-82-M: Labourers' International Union of North America, Local 506, (Applicant) v. Valleyfield Construction Limited and/or Peter Regional Limited Toronto Construction Association, (Respondent). (*Withdrawn*).

2519-82-M: Labourers' International Union of North America, Local 506, (Applicant) v. Toronto Construction Association and Welcon Limited, (Respondents). (*Dismissed*).

2635-82-M: Sheet Metal Workers International Association Local Union 537, (Applicant) v. Edland Building Systems Limited, (Respondent). (*Withdrawn*).

2656-82-M; 2657-82-M: The International Brotherhood of Electrical Workers, Local Union 1788, (Applicant) v. Ontario Hydro, (Respondent). (*Granted*).

0119-83-M: Local Union 2965, Resilient Floorworkers Union, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, (Applicant) v. Tri Star Flooring Limited, (Respondent). (*Withdrawn*).

0227-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. O.S.C. Partitions Inc., (Respondent). (*Withdrawn*).

0254-83-M: Ontario Public Service Employees' Union, (Applicant) v. The Royal Ontario Museum, (Respondent). (*Withdrawn*).

0302-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Tradesmen Carpentry Limited, (Respondent). (*Withdrawn*).

0340-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Losereit Sales and Services Ltd., (Respondent). (*Dismissed*).

0377-83-M; 0378-83-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Standard Insulation Limited, (Respondent). (*Granted*).

0462-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. G. L. Trenching Ltd., (Respondent). (*Withdrawn*).

0470-83-M: Labourers' International Union of North America, Local 506, (Applicant) v. Raljon Construction Company Limited Bonfield Construction Company Limited, (Respondents). (*Withdrawn*).

0515-83-M; 0516-83-M; 0517-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Golden Construction Co., A Division of 506878 Ontario Limited, (Respondent). (*Granted*).

0525-83-M: Local Union 2041, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Nick Giamberardino & Bros. Ltd., (Respondent). (*Withdrawn*).

0536-83-M: Labourers' International Union of North America, Local 527, (Applicant) v. Nation Drywall Construction Limited, (Respondent). (*Withdrawn*).

0547-83-M: Drywall, Acoustic, Lathing and Insulation Local 675, of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Cara Drywall Services Ltd., (Respondent). (*Withdrawn*).

0549-83-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Woodbridge Drywall (1982) Limited, (Respondent). (*Withdrawn*).

0553-83-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Newman Bros. Limited, (Respondent). (*Withdrawn*).

0562-83-M: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081, (Applicant) v. Laverne Asmussen Inc., (Respondent). (*Withdrawn*).

0569-83-M: Labourers' International Union of North America, Local 506, (Applicant) v. Canadian Engineering and Contracting Co. Ltd., (Respondent). (*Granted*).

0586-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Unique Paving Stone Inc., (Respondent). (*Withdrawn*).

0597-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Plastina Investments carrying on business as Frank Plastina Investments Ltd., (Respondent). (*Withdrawn*).

0598-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. W.C. Pietz Limited, (Respondent). (*Withdrawn*).

0609-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Mark O'Connor Disposal and Demolition Limited, (Respondent). (*Withdrawn*).

0613-83-M; 0614-83-M; 0615-83-M: Ontario Pipe Trades Council, on behalf of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Mechanical Contractors Association Ontario, and 482073 Ontario Limited, carrying on business as MECON, (Respondent). (*Withdrawn*).

0619-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ellis-Don Limited, (Respondent). (*Granted*).

0622-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Draggon Contracting Ltd., (Respondent). (*Withdrawn*).

0623-83-M: Labourers' International Union of North America Local 183, (Applicant) v. Empire Paving Ltd., (Respondent). (*Withdrawn*).

0624-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Gold Park Const. – Opalocka Dev. Ltd., (Respondent). (*Withdrawn*).

0625-83-M; 0626-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Inverleigh Construction Ltd., (Respondent). (*Withdrawn*).

0627-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. V.B.N. Construction Ltd., (Respondent). (*Withdrawn*).

0628-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Two – Four Construction Ltd., (Respondent). (*Withdrawn*).

0639-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Ron Robinson Limited, (Respondent). (*Granted*).

0641-83-M: Resilient Floorworkers Local Union 2965, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Tile Rite Company, (Respondent). (*Withdrawn*).

0650-83-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, (Applicant) v. Milvan Iron Works Ltd., (Respondent). (*Granted*).

0661-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Panza Bros. Construction Ltd., (Respondent). (*Withdrawn*).

0663-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Seal Top Paving & Construction Ltd., (Respondent). (*Withdrawn*).

0665-83-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Plibrico (Canada) Ltd., (Respondent). (*Withdrawn*).

0675-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Barclay Construction Hamilton Limited, (Respondent). (*Granted*).

0678-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Craighurst Construction Ltd., (Respondent). (*Withdrawn*).

0679-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Climb Form Work, (Respondent). (*Granted*).

0682-83-M: International Brotherhood of Painters & Allied Trades and Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Bullas Glass Ltd., (Respondent). (*Withdrawn*).

0687-83-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700, (Applicant) v. R. J. Cyr Co. Inc., (Respondent). (*Granted*).

0695-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Kingston Contracting Limited, Kingston Mechanical Division, (Respondent). (*Withdrawn*).

0718-83-M: International Union of Bricklayers & Allied Craftsmen, Local 1, (Applicant) v. Barclay Construction Ltd., (Respondent). (*Granted*).

0727-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. Ray Bigras Drywall & Acoustics Ltd., (Respondent). (*Granted*).

0728-83-M: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Linrin Forming Limited, (Respondent). (*Withdrawn*).

0737-83-M: The Ontario Pipe Trades Council, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, on its own behalf and on behalf of Local Union 800, (Applicant) v. Mechanical Contractors Association Ontario and Bennett and Wright Company Limited, (Respondent). (*Withdrawn*).

0739-83-M: Labourers' International Union of North America, (Applicant) v. Paul D'Aoust Construction Limited, (Respondent). (*Withdrawn*).

0758-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Ventrella Bros. Construction, (Respondent). (*Withdrawn*).

0778-83-M: Christian Labour Association of Canada, (Applicant) v. Crown Electric owned and operated by Crowle Electrical Limited, (Respondent). (*Withdrawn*).

0788-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Mark O'Connor Disposal and Demolition Limited, (Respondent). (*Withdrawn*).

0806-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. C. D. C. Contracting, A Division of Patron Contracting Ltd., (Respondent). (*Granted*).

0816-83-M: Drywall, Acoustic, Lathing and Insulation Local 675, of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. D. Azzolin, (Respondent). (*Withdrawn*).

0817-83-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Pro Interior Systems Incorporated, (Respondent). (*Withdrawn*).

0819-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Petrex Leasing Limited, (Respondent). (*Withdrawn*).

0895-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Lopet Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF THE BOARD'S DECISION

1587-82-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. Ray Matte Enrg. Couvreurs, (Respondent) v. Group of Employees, (Objectors). (*Denied*).

1649-82-R: Canadian Union of Public Employees, (Applicant) v. Corporation of the City of Kanata, (Respondent) v. Group of Employees, (Objectors). (*Denied*).

2273-82-R: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Peter Cipriano Construction Limited, (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener). (*Denied*)

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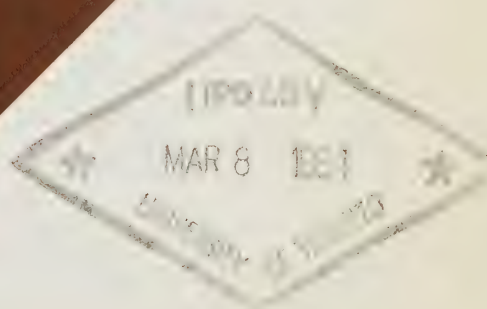
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Decisions

September 83

CA24N
LR
- 54



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Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

CASES REPORTED

1. Armbro Materials & Construction Ltd.; Re Teamsters Union, Local 91	1389
2. Beckett Elevator Company Limited; Re International Union of Elevator Constructors, Local 50; National Elevator and Escalator Association	1391
3. Canada Packers Inc.; Re United Food & Commercial Workers Union, Local 114 and certain named individual respondents	1405
4. Consolidated Bathurst Packaging Ltd.; Re International Woodworkers of America, Local 2-69	1411
5. Dowty Equipment of Canada Ltd.; Re International Association of Machinists and Aerospace Workers, Local Lodge 905	1451
6. Global Demolition Ltd.; Re Labourers' Union, Local 506	1457
7. Halton, The Regional Municipality of; Re Canadian Union of Operating Engineers; Group of Employees	1462
8. Haughton Graphics Limited; Re Graphic Arts International Union, Local 211; Objecting Employees	1464
9. Humber College; Re Jacob Emmanuel Schochet; Re OPSEU	1472
10. Jervis B. Webb Company of Canada Ltd.; Re IBEW, Local 773; Re Carpenters Union, Local 1244; Re Ironworkers Union, Local 700; Re Spider Installations Ltd.	1484
11. Kitchener, City of; Re Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, Local 12; Re CUPE	1490
12. Lilo Rail of Canada Limited and Modern Plating Limited; Re Liberato Petti, Herbert Clark, et al.; Re United Steelworkers of America	1496
13. C.E. Lummus Canada Ltd.; Re IBEW Construction Council of Ontario and IBEW, Local 894	1504
14. Mini-Skool Ltd.; Re OPSEU	1514
15. Nelson Quarry Operation of Genstar Stone Products Inc. and Torres Transport Limited; Re Mount Nemo Truckers Assoc., Local 566, Affiliates of the Gypsum Workers International Union	1531
16. Ontario Hydro; Re CUPE, Ontario Hydro Employees' Union, Local 1000	1536
17. Ontario Hydro and EPSCA; Re U.A. and its Local 527	1547
18. Portiss, Joe; Re Labourers Union, Local 1089 and Rocco D'Andrea	1554

II

19.	Primo Importing and Distributing Co. Ltd.; Re Food and Commercial Workers Union; Primo Employees' Association.....	1560
20.	Riverside Hospital of Ottawa; Re Canadian Union of Operating Engineers; Employee.....	1562
21.	Riverview Manor, operated by Daynes Health Care Ltd.; Service Employees' Union, Local 183	1564
22.	Shaw Festival Theatre Foundation; Re International Alliance of Theatrical Stage Em- ployees and Moving Picture Machine Operators of the U.S. and Canada, Local 461; Employees.....	1579
23.	Toronto, Corporation of the Municipality of Metropolitan,; CUPE, Local 79	1585
24.	Tri-Canada Inc.; Re U.A., Local 46	1591
25.	Vernon Nursing Home Services Limited; Re Lynne Cuff on behalf of Fairvern Staff; Re Service Employees International Union, Local 478	1598

SUBJECT INDEX

- Arbitration – Construction Industry Grievance – Damages – Remedies – Refusal to employ contravening-wide bumping provisions in elevator industry provincial agreement – Compensation for wages including interest component – Board reviewing jurisprudence on power of arbitrators to award interest – Concluding that Board having power to award interest if not limited by collective agreement
- BECKETT ELEVATOR COMPANY LIMITED; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50; NATIONAL ELEVATOR AND ESCALATOR ASSOCIATION..... 1391
- Arbitration – Interference in Trade Unions – Practice and Procedure – Unfair Labour Practice – Complaint of unit work being given to outside firms in attempt to undermine union – Board not deferring to arbitration where scheme to destroy union alleged – Board refusing to inquire into alleged unlawful conduct occurring 18 months previously to complaint date
- NELSON QUARRY OPERATION OF GENSTAR STONE PRODUCTS INC. AND TORRES TRANSPORT LIMITED; RE MOUNT NEMO TRUCKERS ASSOC., LOCAL 566, AFFILIATES OF THE GYPSUM WORKERS INTERNATIONAL UNION 1531
- Bargaining Unit – Construction Industry – Certification application not relating to ICI sector – Reference to road construction in unit proposed by employer requiring sector determination – Good labour relations reasons to avoid sector determinations despite s.144 – Long-standing policy not to exclude students from construction units – Exclusion of employees “covered by subsisting collective agreement” refused where no reference to particular bargaining relationship
- ARMBRO MATERIALS & CONSTRUCTION LTD.; RE TEAMSTERS UNION, LOCAL 91..... 1389
- Bargaining Unit – Practice and Procedure – Bargaining unit sought restricted to Social Service Dept. – Leaving 8 other departments unorganized – Existence of collective agreements in Province with recognition clauses restricted to Social Service Depts’ not satisfying Board of appropriateness – No prima facie case for officer inquiry into community of interest
- HALTON, THE REGIONAL MUNICIPALITY OF; RE CANADIAN UNION OF OPERATING ENGINEERS; GROUP OF EMPLOYEES..... 1462
- Certification – Construction Industry – Practice and Procedure – Employer constructing and altering its building on own behalf – Whether operating business in construction industry – Employees spending majority of time as bricklayers employed as bricklayers – Work performed as bricklayers construction and not maintenance work – Challenge to union’s craft status raised at hearing for first time not entertained
- KITCHENER, CITY OF; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 12; RE CUPE 1490
- Certification Where Act Contravened – Practice and Procedure – Remedies – Prior decision finding employer unlawful conduct and directing vote with remedial measures – Union

IV

losing vote – Alleging unlawful conduct by employer and seeking automatic certification under s.8 – Expressly indicating no desire to have further remedies or new vote directed – Board finding no prima facie case for s.8 – Dismissing application and imposing bar in view of position taken by union

PRIMO IMPORTING AND DISTRIBUTING CO. LTD.; RE FOOD AND COMMERCIAL WORKERS UNION; PRIMO EMPLOYEES' ASSOCIATION..... 1560

Change in Working Conditions – Unfair Labour Practice – Evidence of incidents where no discipline imposed where false claims for subsidy detected – Practice of progressive discipline – Just clause provision of expired agreement in force during freeze period – Discharge of grievor for similar conduct breach of freeze provision

ONTARIO HYDRO; RE CUPE, ONTARIO HYDRO EMPLOYEES' UNION, LOCAL 1000..... 1536

Collective Agreement – Construction Industry Grievance – Whether agreement for use of union label and national minimum standard agreement for commercial pipe fabrication shop collective agreement – Whether constituting voluntary recognition agreement binding respondent employer to provincial agreement

TRI-CANADA INC.; RE U.A., LOCAL 46 1591

Construction Industry – Bargaining Unit – Certification application not relating to ICI sector – Reference to road construction in unit proposed by employer requiring sector determination – Good labour relations reasons to avoid sector determinations despite s.144 – Long-standing policy not to exclude students from construction units – Exclusion of employees "covered by subsisting collective agreement" refused where no reference to particular bargaining relationship

ARMBRO MATERIALS & CONSTRUCTION LTD.; RE TEAMSTERS' UNION LOCAL 91 1389

Construction Industry – Certification – Practice and Procedure – Employer constructing and altering its building on own behalf – Whether operating business in construction industry – Employees spending majority of time as bricklayers employed as bricklayers – Worker performed as bricklayers construction and not maintenance work – Challenge to union's craft status raised at hearing for first time not entertained

KITCHENER, CITY OF; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 12; RE CUPE 1490

Construction Industry – Lockout – Unfair Labour Practice – Employer and UA agreeing to work four nine hour days per week at straight time – Complainant offered same deal or reduction in hours – Demand for forfeiture of overtime rights under threat of reduced hours constituting unlawful lockout – Attempt to alter provincial agreement contrary to s.146(2)

C.E. LUMMUS CANADA LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO AND IBEW, LOCAL 894	1504
Construction Industry Grievance – Arbitration – Damages – Remedies-Refusal to employ contravening industry-wide bumping provisions in elevator industry provincial agreement – Compensation for wages including interest component – Board reviewing jurisprudence on power of arbitrators to award interest – Concluding that Board having power to award interest if not limited by collective agreement	
BECKETT ELEVATOR COMPANY LIMITED; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50; NATIONAL ELEVATOR AND ESCALATOR ASSOCIATION.....	1391
Construction Industry Grievance – Collective Agreement – Whether agreement for use of union label and national minimum standard agreement for commercial pipe fabrication shop collective agreements – Whether constituting voluntary recognition agreement binding respondent employer to provincial agreement	
TRI-CANADA INC.; RE U.A., LOCAL 46	1591
Construction Industry Grievance – Employee receiving overpayment of \$4,578.00 – Terminated for refusing to repay amount of overpayment – Employee not in any degree responsible for error – Employer required to give employee reasonable opportunity to pay back before exercising disciplinary powers – No just cause for discharge	
ONTARIO HYDRO AND EPSCA; RE U.A. AND ITS LOCAL 527.....	1547
Damages – Arbitration-Construction Industry Grievance – Remedies – Refusal to employ contravening industry-wide bumping provisions in elevator industry provincial agreement – Compensation for wages including interest component – Board reviewing jurisprudence on power of arbitrators to award interest – Concluding that Board having power to award interest if not limited by collective agreement	
BECKETT ELEVATOR COMPANY LIMITED; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50; NATIONAL ELEVATOR AND EXCALATOR ASSOCIATION.....	1391
Damages – Duty of Fair Referral – Remedies – Unfair Labour Practice – Prior decision finding unlawful administration of hiring hall – Finding complainant discriminated against in job referrals – Damages calculated on basis of comparison of complainant's earnings with earnings of other active members – Amount reduced for failure to mitigate	
PORTISS, JOE; RE LABOURERS UNION, LOCAL 1089 AND ROCCO D'ANDREA	1554
Discharge for Union Activity – Practice and Procedure – Five grievors discharged soon after certification application filed – Employer inquiring of employees whether they joined union – Union relying on reverse onus and not calling evidence – Board satisfied with employer's explanation of bona fide lay-off and selection procedure	
GLOBAL DEMOLITION LTD.; RE LABOURERS' UNION, LOCAL 506.....	1457
Discharge for Union Activity – Unfair Labour Practice – Casual employee discharged for misconduct – Discipline not disproportionate to misconduct – No room for inference of unlawful motive – Employer satisfying Board no anti-union motive involved	

TORONTO, CORPORATION OF THE MUNICIPALITY OF METROPOLITAN,; RE CUPE, LOCAL 79	1585
Duty of Fair Referral – Damages – Remedies – Unfair Labour Practice – Prior decision finding unlawful administration of hiring hall – Finding complainant discriminated against in job referrals – Damages calculated on basis of comparison of complainant's earnings with earnings of other active members – Amount reduced for failure to mit- igate	
PORTISS, JOE; RE LABOURERS UNION, LOCAL 1089 AND ROCCO D'ANDREA	1554
Duty of Fair Representation – Ratification and Strike Vote – Unfair Labour Practice – Union recommending acceptance of employer offer – Form of ballot giving members choice between ratification and strike – Choice given informed and realistic in circumstances – Not unfair representation – No intimidation during vote – Notice of vote addressed to “members” of union – Agenda indicating “vote on tentative contract” with no reference to strike – No evidence that employees denied opportunity to vote due to defective notice – Complaint dismissed	
LILLO RAIL OF CANADA LIMITED AND MODERN PLATING LIMITED; RE LIBERATO PETTI, HERBERT CLARK, ET AL.; RE UNITED STEELWORKERS OF AMERICA	1496
Duty to Bargain in Good Faith – Interference in Trade Unions – Unfair Labour Practice – Strike – Junior employees exercising right to return to work during lengthy strike – Strike resulting in temporary reduction in work – Employer refusing to accept recall procedure permitting senior striking employees to bump junior employees upon end of strike – Not result of employer discrimination but by-product of relative bargaining power of parties – Not amounting to grant of “super-seniority” to non-striking em- ployees – No violation	
MINI-SKOOL LTD.; RE OPSEU	1514
Duty to Bargain in Good Faith – Unfair Labour Practice – Plant closure announced in six weeks after collective agreement signed – Failure to disclose “highly probable” clo- sure amounting to misrepresentation – Evidence giving rise to rebuttable presumption of de facto decision prior to signing or deliberate postponement of decision until after signing – No continuing duty to bargain during term of collective agreement in On- tario	
CONSOLIDATED BATHURST PACKAGING LTD.; RE INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 2-69	1411
Health and Safety – Worker refusing work because of fumes emitted by Bernite solution – Employer offer of alternate work refused – Worker leaving work on own initiative – Not paid for time missed – Employer having no right to assign alternate work during first phase of investigation – Wrongful assignment not intimidation – Docking of pay not penalty – Complaint dismissed	
DOWTY EQUIPMENT OF CANADA LTD.; RE INTERNATIONAL ASSOCIA- TION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE 905...	1451
Interference in Trade Unions – Arbitration – Practice and Procedure – Unfair Labour Prac- tice – Complaint of unit work being given to outside firms in attempt to undermine	

union – Board not deferring to arbitration where scheme to destroy union alleged – Board refusing to inquire into alleged unlawful conduct occurring 18 months previously to complaint date

NELSON QUARRY OPERATION OF GENSTAR STONE PRODUCTS INC. AND TORRES TRANSPORT LIMITED; RE MOUNT NEMO TRUCKERS ASSOC., LOCAL 566, AFFILIATES OF THE GYPSUM WORKERS INTERNATIONAL UNION 1531

Interference in Trade Unions – Duty to Bargain in Good Faith – Strike – Unfair Labour Practice – Junior employees exercising right to return to work during lengthy strike – Strike resulting in temporary reduction in work – Employer refusing to accept recall procedure permitting senior striking employees to bump junior employees upon end of strike – Not result of employer discrimination but by-product of relative bargaining power of parties – Not amounting to grant of “super-seniority” to non-striking employees – No violation

MINI-SKOOL LTD.; RE OPSEU 1514

Jurisdictional Dispute – Related Employer – Provincial Agreement requiring submission of disputes to IJDB – Employer not bound by agreement but subsidiary bound – Whether employer may rely on related employer provision – Board finding statutory conditions for related employer declaration met – Delay not reason to decline declaration in circumstances – Board not having jurisdiction to inquire into dispute

JERVIS B. WEBB COMPANY OF CANADA LTD.; RE IBEW, LOCAL 773; RE CARPENTERS UNION, LOCAL 1244; RE IRONWORKERS UNION, LOCAL 700; RE SPIDER INSTALLATIONS LTD. 1484

Lockout – Construction Industry – Unfair Labour Practice – Employer and UA agreeing to work four nine hour days per week at straight time – Complainant offered same deal or reduction in hours – Demand for forfeiture of overtime rights under threat of reduced hours constituting unlawful lockout – Attempt to alter provincial agreement contrary to s.146(2)

C.E. LUMMUS CANADA LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO AND IBEW, LOCAL 894 1504

Membership Evidence – Practice and Procedure – August 31 fixed as terminal date in certification application – Board receiving membership evidence stamped September 1 by registered mail – Date on stamp governing documents sent by registered mail – Union failing to satisfy Board of error by Post Office – Membership evidence not considered timely

RIVERSIDE HOSPITAL OF OTTAWA; RE CANADIAN UNION OF OPERATING ENGINEERS; EMPLOYEE 1562

Membership Evidence – Practice and Procedure – Two tiered fee structure used – Test whether present employees given reasonable opportunity to join at lower fee after certification – Union offering non-collective bargaining benefits as incident of membership – Promising improved benefits and wages through collective agreement – Salesmanship short of misrepresentation, coercion or intimidation not subject to Board scrutiny – Union raising possible retaliation by employer not making membership evidence unreliable

HAUGHTON GRAPHICS LIMITED; RE GRAPHIC ARTS INTERNATIONAL UNION, LOCAL 211; OBJECTING EMPLOYEES	1464
Membership Evidence – Whether constitution required exams as condition of admission to union – Whether failure to conduct exams invalidating membership evidence – Whether failure to levy full \$300 initiation fee as per constitution invalidating membership – Constitution imposing residency requirement – No evidence that anyone denied membership on basis on residency – Loan from officer to employee signing membership on condition of repayment not affecting validity of membership	
SHAW FESTIVAL THEATRE FOUNDATION; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE U.S. AND CANADA, LOCAL 461; EMPLOYEES	1579
Practice and Procedure – Arbitration – Interference in Trade Unions – Unfair Labour Practice – Complaint of unit work being given to outside firms in attempt to undermine union – Board not deferring to arbitration where scheme to destroy union alleged – Board refusing to inquire into alleged unlawful conduct occurring 18 months previously to complaint date	
NELSON QUARRY OPERATION OF GENSTAR STONE PRODUCTS INC. AND TORRES TRANSPORT LIMITED; RE MOUNT NEMO TRUCKERS ASSOC., LOCAL 566, AFFILIATES OF THE GYPSUM WORKERS INTERNATIONAL UNION	1531
Practice and Procedure – Bargaining Unit – Bargaining unit sought restricted to Social Service Dept. – Leaving 8 other departments unorganized – Existence of collective agreements in Province with recognition clauses restricted to Social Service Depts' not satisfying Board of appropriateness – No prima facie case for officer inquiry into community of interest	
HALTON, THE REGIONAL MUNICIPALITY OF; RE CANADIAN UNION OF OPERATING ENGINEERS; GROUP OF EMPLOYEES.....	1462
Practice and Procedure – Certification – Construction Industry – Employer constructing and altering its building on own behalf – Whether operating business in construction industry – Employees spending majority of time as bricklayers employed as bricklayers – Work performed as bricklayers construction and not maintenance work – Challenge to union's craft status raised at hearing for first time not entertained	
KITCHENER, CITY OF; RE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 12; RE CUPE	1490
Practice and Procedure – Certification Where Act Contravened – Remedies – Prior decision finding employer unlawful conduct and directing vote with remedial measures – Union losing vote – Alleging unlawful conduct by employer and seeking automatic certification under s.8 – Expressly indicating no desire to have further remedies or new vote directed – Board finding no prima facie case for s.8 – Dismissing application and imposing bar in view of position taken by union	
PRIMO IMPORTING AND DISTRIBUTING CO. LTD.; RE FOOD AND COMMERCIAL WORKERS UNION; PRIMO EMPLOYEES' ASSOCIATION.....	1560
Practice and Procedure – Discharge for Union Activity – Unfair Labour Practice – Five grievors discharged soon after certification application filed – Employer inquiring of	

employees whether they joined union – Union relying on reverse onus and not calling evidence – Board satisfied with employer’s explanation of bona fide lay-off and selection procedure

GLOBAL DEMOLITION LTD.; RE LABOURERS’ UNION, LOCAL 506..... 1457

Practice and Procedure – Membership Evidence – August 31 fixed as terminal date in certification application – Board receiving membership evidence stamped September 1 by registered mail – Date on stamp governing documents sent by registered mail – Union failing to satisfy Board of error by Post Office – Membership evidence not considered timely

RIVERSIDE HOSPITAL OF OTTAWA; RE CANADIAN UNION OF OPERATING ENGINEERS; EMPLOYEE 1562

Practice and Procedure – Membership Evidence – Two-tiered fee structure used – Test whether present employees given reasonable opportunity to join at lower fee after certification – Union offering non-collective bargaining benefits as incidental of membership – Promising improved benefits and wages through collective agreement – Salesmanship short of misrepresentation, coercion or intimidation not subject to Board scrutiny – Union raising possible retaliation by employer not making membership evidence unreliable

HAUGHTON GRAPHICS LIMITED; RE GRAPHIC ARTS INTERNATIONAL UNION, LOCAL 211; OBJECTING EMPLOYEES 1464

Practice and Procedure – Voluntary Recognition – Application filed within year of recognition – Employer nor Union presenting evidence to show union’s entitlement to represent at time agreement entered into – Whether declaration under s.60 prospective only – Agreement not constituting collective agreement – Not extended by *Inflation Restraint Act*

VERNON NURSING HOME SERVICES LIMITED; RE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 478 1598

Ratification and Strike Vote – Duty of Fair Representation – Unfair Labour Practice – Union recommending acceptance of employer offer – Form of ballot giving members choice between ratification and strike – Choice given informed and realistic in circumstances – Not unfair representation – No intimidation during vote – Notice of vote addressed to “members” of union – Agenda indicating “vote on tentative contract” with no reference to strike – No evidence that employees denied opportunity to vote due to defective notice – Complaint dismissed

LILO RAIL OF CANADA LIMITED AND MODERN PLATING LIMITED; RE LIBERATO PETTI, HERBERT CLARK, ET AL.; RE UNITED STEELWORKERS OF AMERICA..... 1496

Related Employer – Jurisdictional Dispute – Provincial Agreement requiring submission of disputes to IJDB – Employer not bound by agreement but subsidiary bound – Whether employer may rely on related employer provision – Board finding statutory conditions for related employer declaration met – Delay not reason to decline declaration in circumstances – Board not having jurisdiction to inquire into dispute

JERVIS B. WEBB COMPANY OF CANADA LTD.; RE IBEW, LOCAL 773; RE CARPENTERS UNION, LOCAL 1244; RE IRONWORKERS UNION, LOCAL 700; RE SPIDER INSTALLATIONS LTD.....	1484
Religious Exemption – OFL convention passing resolution urging CLC to support Palestine Liberation Organization – Applicant claiming religious objection to paying dues to OPSEU until it publicly disassociates from OFL resolution – OPSEU having no policy on issue – No evidence of how OPSEU delegates voted at Convention – Applicant giving unreasonable interpretation to personal or political viewpoint – Objection too remote in relation to OPSEU – Dismissed	
HUMBER COLLEGE; RE JACOB EMMANUEL SCHOCHET; RE OPSEU	1472
Remedies – Arbitration – Construction Industry Grievance – Damages – Refusal to employ contravening industry-wide bumping provisions in elevator industry provincial agreement – Compensation for wages including interest component – Board reviewing jurisprudence on power of arbitrators to award interest – Concluding that Board having power to award interest if not limited by collective agreement	
BECKETT ELEVATOR COMPANY LIMITED; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 50; NATIONAL ELEVATOR AND ESCALATOR ASSOCIATION.....	1391
Remedies – Certificaton Where Act Contravened – Practice and Procedure – Prior decision finding employer unlawful conduct and directing vote with remedial measures – Union losing vote – Alleging unlawful conduct by employer and seeking automatic certification under s.8 – Expressly indicating no desire to have further remedies or new vote directed – Board finding no prima facie case for s.8 – Dismissing application and imposing bar in view of position taken by union	
PRIMO IMPORTING AND DISTRIBUTING CO. LTD.; RE FOOD AND COMMERCIAL WORKERS UNION; PRIMO EMPLOYEES' ASSOCIATION.....	1560
Remedies – Damages – Duty of Fair Referral – Unfair Labour Practice – Prior Decision finding unlawful administration of hiring hall – Finding complainant discriminated against in job referrals – Damages calculated on basis of comparison of complainant's earnings with earnings of other active members – Amount reduced for failure to mitigate	
PORTISS, JOE; RE LABOURERS UNION, LOCAL 1089 AND ROCCO D'ANDREA	1554
Sale of a Business – Nursing home not meeting Ministry safety standards closed down – Licence purchased by company operating other homes in area – Purchaser building new home on land nearby purchased from vendor and absorbing majority of vendor's residents – Different management and operating procedures overridden by purchase of key asset of licence and take over of residents – Sale found	
RIVERVIEW MANOR, OPERATED BY DAYNES HEALTH CARE LTD.; SERVICE EMPLOYEES' UNION, LOCAL 183.....	1564
Strike – Duty to Bargain in Good Faith – Interference in Trade Unions – Unfair Labour Practice – Junior employees exercising right to return to work during lengthy strike – Strike resulting in temporary reduction in work – Employer refusing to accept recall procedure permitting senior striking employees to bump junior employees upon end of strike – Not result of employer discrimination but by-product of relative bargaining	

power of parties – Not amounting to grant of “super-seniority” to non-striking employees – No violation

MINI-SKOOL LTD.; RE OPSEU 1514

Strike – Unfair Labour Practice – Ban on voluntary overtime constituting unlawful strike – Counselling and engaging in unlawful strike found to be violations – Company not having taken legal action in prior instances of overtime ban – Not reasonable to grant relief in present application – Declaration and direction issued

CANADA PACKERS INC.; RE UNITED FOOD 7 COMMERCIAL WORKERS UNION, LOCAL 114 AND CERTAIN NAMED INDIVIDUAL RESPONDENTS... 1405

Unfair Labour Practice – Arbitration – Interference in Trade Unions – Practice and Procedure – Complaint of unit work being given to outside firms in attempt to undermine union – Board not deferring to arbitration where scheme to destroy union alleged – Board refusing to inquire into alleged unlawful conduct occurring 18 months previously to complaint date

NELSON QUARRY OPERATION OF GENSTAR STONE PRODUCTS INC. AND TORRES TRANSPORT LIMITED; RE MOUNT NEMO TRUCKERS ASSOC., LOCAL 566, AFFILIATES OF THE GYPSUM WORKERS INTERNATIONAL UNION 1531

Unfair Labour Practice – Change in Working Conditions – Evidence of incidents where no discipline imposed where false claims for subsidy detected – Practice of progressive discipline – Just clause provision of expired agreement in force during freeze period – Discharge of grievor for similar conduct breach of freeze provision

ONTARIO HYDRO; RE CUPE, ONTARIO HYDRO EMPLOYEES’ UNION, LOCAL 1000..... 1536

Unfair Labour Practice – Construction Industry – Lockout – Employer and UA agreeing to work four nine hour days per week at straight time – Complainant offered same dal or reduction in hours – Demand for forfeiture of overtime rights under threat of reduced hours constituting unlawful lockout – Attempt to alter provincial agreement contrary to s.146(2)

C.E. LUMMUS CANADA LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO AND IBEW, LOCAL 894 1504

Unfair Labour Practice – Damages – Duty of Fair Referral – Remedies – Prior Decision finding unlawful administration of hiring hall – Finding complainant discriminated against in job referrals – Damages calculated on basis of comparison of complainant’s earnings with earnings of other active members – Amount reduced for failure to mitigate

PORTISS, JOE; RE LABOURERS UNION, LOCAL 1089 AND ROCCO D’ANDREA 1554

Unfair Labour Practice – Discharge for Union Activity – Casual employee discharged for misconduct – Discipline not disproportionate to misconduct – No room for inference of unlawful motive – Employer satisfying Board no anti-union motive involved

TORONTO, CORPORATION OF THE MUNICIPALITY OF METROPOLITAN,; CUPE, LOCAL 79	1585
Unfair Labour Practice – Discharge for Union Activity – Practice and Procedure – Five grievors discharged soon after certification application filed – Employer inquiring of employees whether they joined union – Union relying on reverse onus and not calling evidence – Board satisfied with employer's explanation of bona fide lay-off and se- lection procedure	
GLOBAL DEMOLITION LTD.; RE LABOURERS' UNION, LOCAL 506.....	1457
Unfair Labour Practice – Duty of Fair Representation – Ratification and Strike Vote – Union recommending acceptance of employer offer – Form of ballot giving members choice between ratification and strike – Choice given informed and realistic in circumstances – Not unfair representation – No intimidation during vote – Notice of vote addressed to "members" of union – Agenda indicating "vote on tentative contract" with no reference to strike – No evidence that employees denied opportunity to vote due to defective notice – Complaint dismissed	
LILO RAIL OF CANADA LIMITED AND MODERN PLATING LIMITED; RE LIBERATO PETTI, HERBERT CLARK, ET AL.; RE UNITED STEELWORKERS OF AMERICA.....	1496
Unfair Labour Practice – Duty to Bargain in Good Faith – Interference in Trade Unions – Strike – Junior employees exercising right to return to work during lengthy strike – Strike resulting in temporary reduction in work – Employer refusing to accept recall procedure permitting senior striking employees to bump junior employees upon end of strike – Not result of employer discrimination but by-product of relative bargaining power of parties – Not amounting to grant of "super-seniority" to non-striking em- ployees – No violation	
MINI-SKOOL LTD.; RE OPSEU	1514
Unfair Labour Practice – Duty to Bargain in Good Faith – Plant closure announced six weeks after collective agreement signed – Failure to disclose "highly probable" closure amounting to misrepresentation – Evidence giving rise to rebuttable presumption of de facto decision prior to signing or deliberate postponement of decision until after sign- ing – No continuing duty to bargain during term of collective agreement in Ontario	
CONSOLIDATED BATHURST PACKERS INC.; RE UNITED FOOD & COM- MERCIAL WORKERS UNION, LOCAL 114 AND CERTAIN NAMED INDIVID- UAL RESPONDENTS.....	1411
Unfair Labour Practice – Strike – Ban on voluntary overtime constituting unlawful strike – Counselling and engaging in unlawful strike found to be violations – Company not having taken legal action in prior instances of overtime ban – Not reasonable to grant relief in present application – Declaration and direction issued	
CANADA PACKERS INC.; RE UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 114 AND CERTAIN NAMED INDIVIDUAL RESPONDENTS...	1405
Voluntary Recognition – Practice and Procedure – Application filed within year of recog- nition – Employer nor Union presenting evidence to show union's entitlement to rep- resent at time agreement entered into – Whether declaration under s.60 prospective only – Agreement not constituting collective agreement – Not extended by <i>Inflation Restraint Act</i>	

VERNON NURSING HOME SERVICES LIMITED; RE LYNNE CUFF ON BE- HALF OF FAIRVERN STAFF; RE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 478	1598
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1236-83-R Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Armbro Materials & Construction Ltd.** Respondent

Bargaining Unit – Construction Industry – Certification application not relating to ICI sector – Reference to road construction in unit proposed by employer requiring sector determination – Good labour relations reasons to avoid sector determinations despite section 144 – Long-standing policy not to exclude students from construction units – Exclusion of employees “covered by subsisting collective agreement” refused where no reference to particular bargaining relationship

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members C. A. Ballentine and J. Wilson.

DECISION OF THE BOARD; September 23, 1983

[Findings as to membership evidence, trade union status etc. in paragraphs 1-6 omitted]

• • • •

7. The application for certification as filed described the bargaining unit being sought by the applicant in the following terms:

“All truck drivers, employed by the respondent in Ontario Labour Relations Board Area 12 and 29, save and except foremen, those above the rank of foreman, sales and office staff.”

That description is clearly without reference to any sector of the construction industry and, therefore, would embrace all sectors, including the industrial, commercial and institutional (“ICI”) sector. Therefore the application as filed is one which relates to the ICI sector. Section 144(1) of the Act prescribes that the appropriate bargaining unit include all employees of the employer employed in the ICI sector in the Province of Ontario. The unit described in the application is limited to two of the Board’s geographic areas and, therefore, does not satisfy that part of the section 144(1) prescription.

8. Since the Board has previously decided that it rests with the applicant in an application for certification in the construction industry to determine whether it wants its application to relate to the ICI sector (see *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729), a Board Officer contacted the applicant in order to have it clarify the bargaining unit which it was seeking. Subsequently, the applicant advised the Board by telex dated September 20th, 1983, that it wished the bargaining unit description in its application amended to read as follows:

“All truck drivers in the employ of the respondent in Board Area 29, excluding the I.C.I. sector, save and except non-working foremen and those above the rank of non-working foreman.”

It is on the basis of the amended bargaining unit description that the Board has found this application to not relate to the ICI sector.

9. The reply filed by the respondent proposed a bargaining unit described in the following terms:

“All employees working as truck drivers on the company’s road construction project in the Counties of Frontenac and Lennox and Addington, Board Area 29, save and except foremen and those above the rank, camp staff, engineering staff, summer students during the school vacation period and employees covered by a subsisting agreement.”

The reference in that description to road construction would require the Board, in order to describe the bargaining unit in such terms, to determine whether the employees affected were at work on the date of the application in the road building sector of the construction industry. Prior to section 144 being in the Act, the Board consistently avoided describing bargaining units in the construction industry in a way which would require it to make sectoral determinations in a certification proceeding. See the Board’s decision in *Lyle West Electric Limited*, [1978] OLRB Rep. Nov. 999. In spite of the need to refer to the ICI sector imposed by section 144 of the Act, the Board continues to hold the view that there are good labour relations reasons for avoiding sectoral determinations in the context of construction industry certification proceedings and said so in *Pelar Construction Ltd.*, [1981] OLRB Rep. Feb. 210. Since the *Pelar* decision, the Board has consistently followed that dictum. For these reasons, it is unlikely that the Board would find the bargaining unit proposed by the respondent to be an appropriate unit under section 144 of the Act.

10. The respondent’s description also seeks exclusions beyond those being sought by the applicant. It is the Board’s view that those exclusions with respect to camp staff and engineering staff would be superfluous because of the discrete nature of the bargaining unit normally granted to the applicant with respect to the construction industry. In the case of the summer students, it has been the Board’s consistent and long-standing practice not to exclude students from construction industry bargaining units. With respect to the request to exclude employees covered by a subsisting collective agreement, the Board occasionally finds it necessary to exclude from a construction industry bargaining unit employees covered by a particular subsisting collective agreement in order to avoid an overlap or conflict with the pre-existing bargaining rights of another trade union. The respondent has not named in paragraph 10 of its reply any trade union claiming to be the bargaining agent or to represent any employees who may be affected by the application. When a Board Officer contacted the respondent to try and clarify the requested exclusion, the respondent was not prepared to specify a particular collective agreement or agreements. Therefore, it would appear that it is seeking a general exclusion and not an exclusion of a particular bargaining relationship which poses a potential conflict with the bargaining rights which would otherwise be granted to the applicant. In these circumstances, the Board is not prepared to allow the exclusion.

11. The respondent has indicated in item (2) of paragraph 14 of the reply that the Board may dispose of this application without a hearing “subject to satisfactory description of the bargaining unit, exclusions and area.”

12. Having regard for the foregoing comments about the unit proposed by the respondent,

ent, it is unnecessary in the Board's view to list this application for hearing. However, if the respondent believes the Board has erred in this respect, or in respect of its findings below, it should direct a request to the Board to reconsider its decision stating its reasons therefor.

13. Having regard for all of the foregoing, the Board further finds that all truck drivers in the employ of the respondent in the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

14. The Board is satisfied on the basis of the all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 15, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. A certificate will issue to the applicant.

2026-81-M International Union of Elevator Constructors, Local #50, Applicant, v. Beckett Elevator Company Limited, Respondent, v. National Elevator and Escalator Association, Intervener

Arbitration – Construction Industry Grievance – Damages – Remedies – Refusal to employ contravening industry-wide bumping provisions in elevator industry provincial agreement – Compensation for wages denied including interest component – Board reviewing jurisprudence on power of arbitrators to award interest – Concluding that Board having power to award interest if not limited by collective agreement

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. Kennedy and F. W. Murray.

APPEARANCES: B. Chercover, B. Morran and B. Shanks for the applicant; W. J. McNaughton and A. Hopkirk for the respondent; A. Reistetter for the intervener.

DECISION OF THE BOARD; September 23, 1983

I

1. This is a referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act*. The referral was filed on December 17, 1981, adjourned on the consent of the parties, and eventually came on for a hearing before the Board on February 22, 1982. At that hearing the parties made a number of submissions which are more fully set out and dealt with

in two Board decisions dated September 21, 1982 and March 17, 1983. Those matters need not be referred to here. It suffices to say that for the reasons set out in those earlier Board decisions, the Board determined that it would hear the union's grievance on its merits. A hearing for this purpose was held on July 6, 1983.

2. The grievance involves the so-called industry-wide "bumping" provisions of a provincial agreement binding the complainant union, and the respondent Beckett.

• • • •

[Review of collective agreement provisions and evidence omitted]

8. On the basis of the totality of the evidence before the Board, we find that Beckett was in breach of Article 10.15 of the collective agreement when it failed to hire the seven individuals referred to it by the union on October 1st, 1981. We find, therefore, that those individuals are entitled to compensation for the wages and benefits lost by reason of Beckett's breach of the collective agreement.

• • • •

9. A final issue which must be determined is whether the compensation award should also include an interest component to reflect the fact that the grievors have been denied the use of monies which should have been paid to them in October, 1981 if the terms of the agreement had been complied with. The union asserts that the Board should take the same approach as it does in unfair labour practice cases where interest is routinely awarded (see: *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35, and see also Practice Note 13 of September 8, 1980). It argues that the employees have been deprived of their lost wages for more than a year and a half, and that interest is necessary to put them in the position that they would have been in had the employer complied with its contractual obligations. Beckett argues that the Board has no jurisdiction to award interest because such award would be penal in effect and not merely compensatory. Beckett also argued that there should not be any award of interest where there is a *bona fide* dispute as to the interpretation or application of the agreement. Finally, Beckett argued that the notion of interest is based upon an erroneous assumption that employees would invest the money which they receive in wages. It is submitted that this is most unlikely to be the case. Even if the employees have been "out of pocket" for a year and a half, Beckett argues that no compensation is properly attributable to this delay in payment.

II

10. This is not the first time that the Labour Relations Board has been called upon in a section 124 proceeding to make a compensation award which includes an interest component. Interest has been awarded in: *Caroll Electric (1982) Limited*, [1983] OLRB Rep. Aug. 1282; *Vanbots Construction*, [1982] OLRB Rep. July 1086; *Proweld Company Limited*, [1982] OLRB Rep. March 437; and, *White and Greer Company Limited*, Board File 1404-81-M, decision dated March 23, 1981, (unreported). However, since this issue has recently been the subject of some arbitral debate (see, for example, the contrasting opinions expressed in *Re Keeprite Inc. and Keeprite Workers' Independent Union* (1982), 8 L.A.C. (3d) 35 (MacLaren) and *Re Air Canada and Canadian Air Line Employees' Association* (1981), 29 L.A.C. (2d)

142), it may be useful to briefly set out our own views on the propriety of an award of this kind.

11. We may begin by observing that, like most collective agreements, the present one does not address the remedial authority of the arbitrator at all. It merely provides (as section 44 of the *Labour Relations Act* requires) that the arbitrator is to render a “final and binding” decision on the matters submitted to him for adjudication. The remedial content of those words is unspecified. Once an arbitrator has found a breach of the collective agreement, there is no guidance in the agreement itself as to what, if anything, should be done about it, other than the general injunction that he cannot “add to”, “subtract from”, or “modify” the substantive terms. Similarly, under section 124 of the *Labour Relations Act*, there is no elaboration of what remedies are available to the Labour Relations Board to rectify particular breaches of the construction industry collective agreements to which that section applies. Once again, the Board is merely directed to render a final and binding determination.

12. But this rather sparse delineation of the Board’s (or an arbitrator’s) remedial authority does not mean that it is limited to what the parties have expressly spelled out in their collective agreement, nor is it necessarily defined by what a court or arbitrator might do in a common law or commercial context. For example, the fact that a court would not direct reinstatement in a wrongful dismissal action, does not mean that a labour arbitrator cannot direct reinstatement of an employee unjustly discharged, even if the collective agreement does not expressly say so. Arbitrators have been doing just that for more than 30 years. For the fact is that “a collective agreement is fundamentally different from an ordinary commercial contract or contract of employment...and so common law concepts give way to the negotiated agreement and the jurisdiction of arbitrators to give final and binding decisions where differences arise between the parties...” – to borrow the words of Brook, J. A. in *Blouin Dry-wall Contractors Limited v. United Brotherhood of Carpenters and Joiners of America, Local 2486*, 75 CLLC ¶14,295. Common law approaches do not provide an unfailing guide to the administration of collective agreements and, in our view, it is wrong in principle to assume that the law of labour arbitration must necessarily conform to them (see *McGavin Toastmaster Limited v. Ainscough et al.*, 75 CLLC ¶14,277 (S.C.C.)). Indeed, the Ontario Court of Appeal has even suggested, recently, that “while it may be helpful for arbitration boards to seek guidance by way of analogy from established legal procedures, they risk committing jurisdictional error by rigid adherence to them” (see *Corporation of the City of Toronto v. Canadian Union of Public Employees, Local 79*, 82 CLLC ¶14,174 per Blair, J. A.).

13. Nor is the arbitration process established under sections 124, 44, or 45 of the Act totally analogous to a commercial arbitration. In particular, it cannot be said that this process is solely the creature of the parties’ agreement or that they have opted for it as a matter of voluntary choice. The arbitration of grievances is a compulsory feature of modern labour legislation and reflects a legislative preference for this method of resolving disputes as an alternative to industrial conflict which is typically prohibited during the currency of the collective agreement. Indeed, so pervasive is this concern that a “no-strike” and an arbitration provision must be part of every collective agreement or are *deemed* to be there (see sections 42 and 44(2)), the Labour Relations Board may rectify any arbitration provision which it considers inadequate, and sections 45 and 124 provide alternative arbitral forums to which either party may resort *notwithstanding* what they may have provided for in their collective agreement. In this context, it is somewhat misleading to focus on the quasi-contractual foundation of the arbitration process to the exclusion of the legislative framework of which it is a part, and a

little artificial to speculate about what the parties must have intended, if they have done no more than echo the mandatory language of section 44.

14. This is not to say that an arbitrator has *carte blanche* to ignore the substantive terms of the collective agreement. Obviously he must respect the integrity of the bargain which the parties have made. To do otherwise, would negate an essential premise of our free collective bargaining system. An arbitrator cannot modify or add to the terms to which the parties have agreed. On the other hand, an arbitrator has a statutory mandate to remedy breaches of the collective agreement (or, what amounts to much the same thing, a mandate from the parties because of the language which they are required by statute to include in their agreement). In our view, in interpreting that mandate, he should be loathe to imply restrictions where there are none in the agreement – especially when, as in the present case, such approach would limit compensation for tangible and readily foreseeable losses. And, at the risk of belabouring the obvious, we reiterate that in determining what remedial response is necessary to effect a final and binding settlement of a grievance, an arbitrator must bear in mind not only what the parties have provided expressly in their collective agreement, but also the statutory policy underlying the arbitration process. When the Labour Relations Board is acting as arbitrator under section 124 of the Act, its mandate to “hear and determine” the question between the parties, and render a “final and binding” determination, involves similar considerations.

15. None of this is new of course. Since the seminal decision of Professor Bora Laskin (as he then was) in *Re Oil, Chemical and Atomic Workers and Polymer Corp. Ltd.* (1959), 10 L.A.C. 51, it has been clear that an arbitrator’s remedial authority can arise either expressly or *by implication* from the terms of a collective agreement. In Professor Laskin’s view (which was ultimately confirmed in the Supreme Court of Canada), the power to direct financial compensation arose from the contractual (and statutory) requirement to render a final and binding determination, even though the collective agreement contained no express power to award damages; moreover, in reaching this conclusion, he referred to the special role which arbitration must play in a collective bargaining process mandated by statute. So did McRuer, C.J.H.C., and Aylesworth, J.A., when the *Polymer* case was taken on judicial review. The implied authority to award damages was seen as a necessary implication or flowing from the statute.

16. The same general approach was taken by Lacourciere, J. (as he then was) in *Re Samuel Cooper and Co. Ltd. and International Ladies Garment Workers’ Union et al.* [1973] 2 O.R. 841. In that case the Divisional Court had to consider whether an arbitrator had the implied authority to make an order in the nature of a mandatory injunction. The applicant employer had argued that the arbitrator had no such jurisdiction and should not have made an affirmative direction in circumstances where a court would not have done so at common law. The Divisional Court disagreed. After referring to section 37(1) [now 44(1)] of the Act the Court observed:

It appears that the special tribunals created by unions and employers, and directed by statute to bring about final and binding settlement of all differences, ought to have the necessary powers to achieve such results.

• • • • •

In our opinion the jurisdiction of the arbitrator was sufficiently wide

to encompass a full range of remedy, unless expressly limited by the *Labour Relations Act* or the terms of the collective agreement. I can find no such limitation and the wording of s. 37(1) of the Act is such that the arbitrator was correct in this particular case in making the orders provided.

The arbitrator's remedial authority was determined by reference to the *Labour Relations Act* which required the parties' agreement to include the terms which were before the arbitrator for consideration.

17. In *Heustis v. New Brunswick Electric Power Commission*, [1979] 2 S.C.R. 768, the Supreme Court of Canada has recently pointed out why the remedial powers of an arbitrator should be construed broadly:

There is a very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers. The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final, and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may be maintained.

The significance of that observation, lies, once again, in its recognition that a full and responsive range of remedial powers is the "indispensible complement" to a *statutory scheme* designed to achieve a satisfactory resolution of disputes which arise during the currency of a collective agreement.

18. If arbitrators are empowered to award compensation – as they clearly are following the *Polymer* decision – what should the purpose of such award be? Clearly, it should be to put the aggrieved party, so far as money can do (and perhaps subject to the limitations of reasonable foreseeability and mitigation), in the same position as he would have been in had there been no breach of the agreement. In *Association of Radio and Television Employees of Canada (CUP-CLC) v. Canadian Broadcasting Corp.*, [1975] 1 S.C.R. 118, the Supreme Court of Canada put it this way:

The conclusion in [*Polymer*] was that although the awarding of damages was not, in express terms, stated in the agreement as being a power of the board of arbitration, the loss sustained as a result of a breach of the agreement was a part of a "dispute" regarding an "alleged violation" of the agreement.

The object of awarding damages for breach of contract is to put the injured party into the position in which he would have been had the contract been performed. What the board of arbitration sought to do in the *Polymer* case was to put the injured party into that position. Its authority to do so was found, implicitly, though not expressly, in the collective agreement.

19. The question in this case, then, is whether the aggrieved employees should be

awarded not only the money they should have been paid in 1981 if the terms of the collective agreement had been honoured, but also some additional sum in recognition of the fact that, for almost two years now, the respondent has had the use of that money and the grievors have not. Such sum would be tantamount to an award of interest on the unpaid wages and would be necessary to fully compensate the aggrieved employees for what they have lost. Conversely any award which does not take into account the cost of money will result in less than complete recovery. However, in our view, there is little to recommend the latter result if there is a plausible interpretation of the agreement and section 124 which permits a more accurate and realistic measure of compensation. In this regard, we are attracted to the observations made by Seaton, J.A. in *Re West Coast Transmission Co. Limited and Majestic Wiley Contractors Limited*, (1982) 139 D.L.R. (3d) 97 at p.101:

If the matter is at large and to be resolved as a question of policy, I would strongly favour permitting arbitrators to award interest. I can think of no valid reason why arbitrators deciding a claim should be powerless to grant a remedy that a judge hearing the same claim would be bound to grant. The claimant before the arbitrator would be severely prejudiced in this day of high interest rates. I can think of no good reason why the arbitrator should not be able to give him a complete remedy. An award in a commercial case that does not take into account the cost of money will not do justice between the parties because it will have disregarded a major cost of most enterprises.

For most arbitrations I would expect that the arbitrators could calculate an interest factor in arriving at "the loss suffered" or "the cost incurred" or "an equitable adjustment" in price. The interest factor would not be interest upon the loss or cost or adjustment, but part of the loss or cost or adjustment, calculated at the time of the handing down of the award.

20. In *West Coast Transmission*, the British Columbia Court of Appeal concluded that a commercial arbitrator had the implied authority to award interest, even though the contract under consideration did not expressly so provide, and the *Court Order Interest Act*, R.S.B.C. 1979, c.76 did not apply to arbitrations. Of course, for the reasons we have already mentioned, we do not suggest that an arbitrator under the *Labour Relations Act* is necessarily in the same position as a commercial arbitrator. Clearly he is not. However, in our view, the policy considerations similar to those expressed by Seaton, J.A. are equally applicable to the present proceeding.

21. Can a labour arbitrator's compensation award include an interest component of this kind? Many arbitrators have answered in the affirmative – at least in the absence of any provision in the agreement limiting the arbitrator's authority. That was the conclusion of the Board of Arbitration in *Air Cas* founded on a much more general basis. The Board looked to the agreement not for any express power to include an awarding the *Polymer* decision and the opinion expressed in *Samuel Cooper*, *supra*, the Board concluded that the power to award an interest component was part of its implied authority to compensate and "make whole" an aggrieved party. Interestingly, the Board could have relied on the terms of the collective agreement giving it the right to make a "just and equitable" decision and to grant a "monetary award"; however, the rationale for the decision was founded on a much more general basis.

The Board looked to the agreement not for any express power to include an interest component in the compensation award, but rather to see whether there was anything in the agreement to limit what would otherwise be the Board's implied authority to fashion an effective remedy. It rejected the suggestion that a limit on the arbitrator's remedial authority could be based upon past arbitral practice:

In light of the foregoing, subject to the terms of the collective agreement in each case, it would appear to be an appropriate time for boards of arbitration generally to give careful consideration to whether interest should be included in a damage award to redress breaches of a collective agreement to more truly put the aggrieved party into the position he would have been in had the collective agreement not been violated.

While it could be argued that the failure of arbitrators to award interest over many years has given rise to an expectation that unless it is expressly provided for an arbitrator is without authority, I reject this argument. In the first place the Supreme Court of Canada in *Polymer, C.B.C. and Heustis, supra*, and the Ontario Divisional Court in *Re Samuel Cooper & Co. Ltd. and Int'l Ladies' Garment Workers' Union et al.* (1973) 35 D.L.R. (3d) 501, [1973] 2 O.R. 841, have concluded that unless expressly limited, an arbitrator has full remedial authority, which would include interest in a given situation. Secondly, interest has seldom been requested. There is no series of cases in which arbitrators have decided either that they lack the authority to award interest or that interest is inappropriate as would give rise to the legitimate expectation that if not expressly provided for in the collective agreement the arbitrator is without the authority. In these circumstances it is difficult to infer that the absence of an express authority indicates that the parties did not intend to clothe an arbitrator with wide remedial authority, including the authority to award interest. Indeed, in my view, the properly held expectation is that where an arbitrator has broad remedial authority to fashion a monetary remedy, as in this case, clear and precise language would be required to restrict his authority to award interest.

22. Since *Air Canada*, there have been a number of arbitration decisions in which back-pay awards have included an interest component. In *Re McKellar General Hospital and Service Employees Union, Local 268* (1981), 30 L.A.C. (2d) 229 (Prichard), the arbitrator held that his backpay award should include an interest factor because he found the *Air Canada* reasoning to be "complete and compelling". Interest on wages owing was also awarded by Professor Palmer in *Re Canadian Cannery Ltd. and United Food and Commercial Workers, Local P596* (1982), 5 L.A.C. (3d) 130 with the following comment (at page 134):

There remains one question to deal with in this matter and that relates to the issue of interest on the money involved. As put forward by the union, essentially the company has retained the "earnings" of the grievor for a considerable period of time. Consequently, given the economic conditions of the country and the general cost of money, it was urged that this board should follow the developing arbitral pattern and order the company to pay interest on the basis of the "normal Ontario Relations

Board formula''. The company rejected this point on the basis that in the instant circumstances there was a genuine issue between the parties and that the company had not acted arbitrarily. Consequently, it was requested that we not exercise our discretion in this regard.

Having considered the matter, it is the view of the board that this is, in fact, an appropriate case for the issuance of interest on the claim by the grievor. On this point we would note that while the company might consider the issue to be one which was genuine, it would seem more appropriate in our opinion to characterize their position as "technical". Consequently, having put forward argument and failed, it seems to us inappropriate that Mr. Groot bear the loss of money that he should have received a long time ago.

And in an unreported award involving *Toronto Western Hospital and C.U.P.E. Local 1744*, arbitrator G. W. Dunn referred to section 38 of the *Ontario Judicature Act*, which allows interest in court actions. His language is reminiscent of that used by Seaton, J.A. in *West Coast Transmission*, *supra*:

Although section 38 has no application to arbitration boards constituted under a collective agreement, its passage nevertheless reflects public concern that consideration should be given to the award of interest in the assessment of damages. When a person discharged or suspended is denied recourse to the courts, the remedies available before a board of arbitration should not be patently less equitable.

23. Beckett argues that an award of interest would involve the imposition of an unauthorized "penalty". A similar submission prompted the following response from the Ontario Public Service Grievance Settlement Board:

Essentially, the rationale is one of compensation: an employee who has been deprived of funds because of an unjust discharge or suspension is deprived of the opportunity to use those funds. He may even be forced to borrow funds, which in these days of high interest rates is an expensive undertaking. In order to ensure that the employee is compensated because of his deprivation of funds, and is put in the position in which he would have been had he not been denied remuneration, he must be given interest on the funds owing. Such an award is not to be regarded as punishment of the employer, but as compensation to the grievor.

(See *Travers*, unreported decision dated February 11, 1982.) In *Re Mohawk College of Applied Arts & Technology and Ontario Public Service Employees' Union* (1982), 5 L.A.C. (3d) 237, arbitrator H. D. Brown, expressed the same opinion:

In appropriate situations I am persuaded that interest on the amount of compensation awarded can be given so as to fully compensate the employee who was wrongfully dismissed and to provide a full remedy for the breach of the agreement. The allowance for interest in those circumstances arises as a matter of assessment of compensation and not as a

penalty against the employer, but as offsetting monetary consideration for the lack of use of the money which the employee would have obtained had it not been for his dismissal.

24. It will be seen, therefore, that with certain exceptions – one of which will be examined in a moment – there is a developing arbitral consensus in Ontario that a compensation award can include an interest component. If an aggrieved party has been out of his money for a period, there should be a compensatory interest payment for the time for which the sum has been outstanding.

25. Arbitrators in British Columbia now take the same position. In *Re British Columbia Hydro and Power Authority and International Brotherhood of Electrical Workers, Local 258* (1982), 5 L.A.C. (3d) 179 (Baigent), the arbitration award includes the following comments:

A more basic question is whether an award in respect of back wages *should* include an amount for interest. In my view, it should. The purpose of any monetary award of back wages is to put the aggrieved party where he would have been had the agreement not been breached. In cases such as this the grievor would have received wages on a weekly basis over each month of the breach prior to the adjudication. The grievor was deprived of that money and, inferentially, of its use. I need not speculate on whether the grievor would have invested the money or whether he borrowed money during the period of the breach. The simple fact is that he was not in possession of it and I must now consider how to compensate him for that. In my view, any compensation which ignored the interest factor would not be consistent with the basic principle of damages awards. In cases involving back wages, an employer's breach of the collective agreement has deprived the employee of the use of the money. A meaningful remedy should recognize that loss by including a sum in respect of interest so that the employee is fully compensated for the employer's breach of the collective agreement.

It is true that the common law courts did not include in their damage awards an amount in respect of interest unless the contract between the parties provided for such a payment. That has changed with the *Court Order Interest Act*, R.S.B.C. 1979, c.76 (formerly the *Prejudgment Interest Act*, 1974 (B.C.), c.65), which now directs a "court" to award interest on moneys which are found to have been owing. In my view, an arbitration board is not a "court" within the meaning of that statute and the powers of an arbitration board under a collective agreement must be determined with reference to the *Labour Code*. The significance of the scheme under the *Court Order Interest Act* lies in its recognition that the "making whole" of a party wrongfully deprived of money should normally include an amount in respect of interest.

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In the case of an employee deprived of money because of a breach of a collective agreement the issue is one of restitution which is relatively

straightforward and uncomplicated. In my view, there is no reason in law or policy why a grievor wrongfully deprived of his money at an earlier date should have to "make a case" for his entitlement to interest. While an arbitration board undoubtedly has the discretion to withhold a remedy in the particular circumstances of any case, interest should normally go as a matter of course in a situation where moneys have not been paid because of a breach of a collective agreement by either party.

An appeal from this award to the British Columbia Labour Relations Board was rejected because the Board agreed with the arbitrator's ruling:

The principles of restitution indicate the grievor should be put in the same position he would have been in had the breach of the collective agreement not occurred. In days of high interest rates and high inflation, an award consisting merely of back wages would not adequately compensate the individual for the loss suffered in many cases. The grievor may have lost the use of money which is rightfully his for a significant period of time, or may have had to borrow in order to substitute for the money which should have been paid initially. That loss can adequately be compensated at the later time of the arbitration award through the awarding of damages including an interest factor.

Another way of viewing this, is to consider the effect of a late payment of the amount owing to the grievor. In times of high inflation, it is well known that payment in future devalued dollars, is not worth as much as payment in current dollars. If an arbitration board awards a grievor payment of a certain sum one year after the date on which he should have had the money, the grievor will be out-of-pocket the difference between the amount he might have been paid, and the erosion factor due to inflation at the date on which the awards is made. One way of compensating for this, would be to calculate the damage award in terms of "real dollars" back to the date of the breach of the collective agreement. Another, and perhaps similar way, is to award interest on the damages.

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Far from being punitive, the awarding of interest does no more than restore the grievor to the position he might have been in had the breach of the collective agreement not occurred. It may be punitive *to the grievor not to award* interest and thereby give the employer the windfall of use of the money for a period of time. It certainly would not be punitive against the employer to award interest and make the grievor whole in respect of the breach of the collective agreement.

It should also not be forgotten that sometimes the employer is the grievor. In such cases, if damages are awarded, the same principles with respect to interest awards would apply.

While in both decisions there was reference to the British Columbia Labour Code, we do not think that, in respect of the power to award monetary compensation, the situation is any different in Ontario. (See also, *Re Pacific Western Airlines Limited and Canadian Airline Employees' Association* (1982), 7 L.A.C. (3d) 340 (Larson).)

26. The most interesting contrary view is that of Arbitrator R. H. MacLaren in *Keeprite Products*, *supra*. The essence of his rationale appears in the following passages from the award:

The board of arbitration is created by the contract between the parties described as a "collective agreement". The board is a creature of the parties' agreement with the jurisdiction conferred upon it by their agreement. The agreement is the fundamental source of the subject-matter that may come within the jurisdiction of this, or any other, board of arbitration. The collective agreement defines the substantive authority of the board. A clause, such as art. 23.13, is explicit recognition of these fundamental propositions. Such a clause is nothing more than a restatement of the general principle found in contract law that a court, or board of arbitration, will not make a contract for the parties but merely interpret it. The function of a board of arbitration is to determine the parties' intention as expressed in the written collective agreement and not to describe what the collective agreement should have been.

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The legal rights of the parties in this case involve the application of the principles of the law of contracts and its assessment of damages. In discussing the general principles of the law of contracts it is often said that the innocent party must be put in as good a position as he would have been had the contract been performed. Professor Fridman in his textbook, *The Law of Contract in Canada* (1976), in a footnote at p. 575, qualifies that statement by saying: "...this does not mean that interest on damages could be awarded at common law (unless there was an express or implied agreement between the parties to such effect)". Citing in support of the proposition, the case of *Eaton v. The Queen* (1972), 31 D.L.R. (3d) 723, [1972] F.C. 185, affirmed 42 D.L.R. (3d) 319, [1972] F.C. 1257 (C.A.).

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In the text of *The Law and Practice of Commercial Arbitration* authored by the chairman of the present board of arbitration and Professor Palmer, it is stated at p. 88 that: "As a general rule, arbitrators have no jurisdiction to award interest on their awards. Any right to impose interest and cost must be conferred by statute." Citing in support of the proposition, *Re Ketcheson and Canadian Northern Ontario R. Co.* (1913), 13 D.L.R. 854, 29 O.L.R. 339, 16 C.R.C. 286 (C.A.); *Re Wurz et al. and Gammel Construction Ltd. et al.* (1978), 84 D.L.R. (3d) 68, [1978] 2 W.W.R. 450 (B.C.S.C.).

In view of the quotations from the foregoing authorities it seems clear that the principle of the common law measure of damages for lost expectation does not embody interest except where there was a failure to pay money when it was due under a contract. The common law proposition has been altered by statute in England (see the footnote, to Professor Trietel's text) and in Ontario by the *Judicature Act*, R.S.O. 1970, c. 228, s. 38 (now R.S.O. 1980, c.223, s. 36). The Ontario provisions were further modified in 1977 by c. 51, s. 3(1) which rewrote s. 38 to permit the awarding of pre-judgement interest and further clarifying the previous cryptic provisions of s. 38 stating interest to be payable in all cases permitted by law.

It is, therefore, found that the common law principle, rooted in the law of contract, to assess damages for breach of a contract (or collective agreement), does not include interest. To the extent that *Re Air Canada and Canadian Air Line Employees' Assoc.* (1981), 29 L.A.C. (2d) 142 (Picher), does suggest the contrary it is found to be incorrect and is not upheld or followed in this decision.

27. The difficulty with this analysis is that it says both too much and too little: too much about the contractual foundation for the arbitration process which, as part of the collective agreement, is seen to be solely the creature of the parties, and too little about the statutory function which the mandatory arbitration process is designed to achieve. With respect, where the parties have merely embraced the mandatory language of section 44 of the Act, does it make sense to ponder about what they intended – other than to comply with the law? Is it not equally important to consider what the Legislature must have intended when it made those words and resort to arbitration a compulsory part of every collective agreement? The statutory language is important, for as we have recently seen, the imperatives of the statute cannot be avoided even if the parties purport to do so expressly – see the recent line of arbitral and judicial decisions giving probationary employees access to arbitration even when, under the terms of the collective agreement, the parties have expressly denied it. To the extent which one must speculate about the particular intent of the parties, it could only be expressed in the general way that the Court did in *Polymer* or *CBC*: to put the aggrieved party in the position he would have been in had there been no breach. The artificiality of Professor MacLaren's approach is merely underlined in the circumstances of the present case where this Board is substituted for the forum provided in the agreement, where the collective agreement in question conveys rights upon individuals who are not employees of the respondent, where the respondent never expressly agreed to the clause in question, and where the respondent is not even a member of the employer bargaining agency which, by statute, has the right to negotiate and conclude a binding collective agreement on its behalf.

28. Nor is it obvious to us why the parties' rights under a collective agreement should depend upon what the situation would be *if* a collective agreement were a commercial contract and *if* the powers of a labour arbitrator were the same as the powers of an arbitrator in a commercial context. Why should common law contract rules necessarily govern the interpretation of a legal document with characteristics, rooted in the statute, which are entirely foreign to the common law? Following the decision in *West Coast Transmission* (which was referred to with apparent approval in *Billes v. Parkin Partnership Architects Planners* (1983), 40 O.R. (2d) 525 (O.C.A.)), there may be some doubt whether a commercial arbitrator can award in-

terest; but even if he cannot, should the remedial authority of a labour arbitrator depend upon the jurisdiction of an adjudicator in entirely different circumstances? We do not think so; and it is interesting to note that while Professor Palmer's text on commercial arbitration is relied upon for the proposition that commercial arbitrators cannot award interest, Professor Palmer himself, sitting as a labour arbitrator in *Canadian Cannerys*, *supra*, had no difficulty in deciding that, in appropriate circumstances, a compensation award should include an interest component. We agree.

29. We see the present problem in very simple terms. Under section 44 of the *Labour Relations Act*, the parties are required to give an arbitrator the authority to render a "final and binding" determination of the matters in dispute between them. Those words appear in the collective agreement before us. They are undefined and unrestricted. Section 124 of the Act also empowers the Board to render a final and binding determination of the grievance before it. Since *Polymer*, it has been clear that an arbitrator has the power to award compensation, and as the decision of the Supreme Court of Canada in *C.B.C.*, *supra*, indicates, the purpose of an award of compensation is to remedy the breach of the agreement and put the aggrieved party in the position it would have been in if there had been no violation of the collective agreement at all. *West Coast Transmission* affirmed (as a number of labour arbitrators have recognized) that an interest component is an important aspect of the measure of damages when an aggrieved party is able to establish that a sum of money should have been paid some months or years before. The interest component is not a penalty. It is part of the compensation for the loss incurred, and that there is a cost or loss arising when money is not paid on time is obvious to anyone who has worried about the size of his accounts receivable. Thus, the issue before us really boils down to this: should the aggrieved employees in this case be compensated for the tangible and readily foreseeable losses which they have suffered as a result of the respondent's breach of the collective agreement? In our view, the answer is yes. We see no reason why this Board should apply a standard in which an aggrieved party (be it the employer, the trade union, or an individual) should receive less than full compensation for a breach of the collective agreement. If there is to be such limitation upon the arbitrator's (or the Board's) remedial authority, it must be found in the express language of the parties' agreement. Here there is none; and that being so, we are of the view that the power to make a final and binding determination includes the power to make an interest component part of the compensation award.

30. Having regard to the foregoing, the Board is of the opinion that it has the authority to award a sum to compensate the grievors for the loss of the wages and the use of those funds which they would have had if in 1981 the employer had complied with the terms of the collective agreement. The only question remaining is how such loss may be calculated and quantified.

31. The cost of money must necessarily be somewhat indefinite, depending upon who is borrowing and what the funds would have been used for. An individual deprived of money which would be used for a consumer purchase may have to take out a loan or use a credit card carrying interest of more than twenty per cent. On the other hand, an individual whose wages would have been deposited in a savings account may have earned as little as eight per cent. In between, there are a variety of investment vehicles with a range of potential yields. Which of these interest rates should the Board take as a reasonable measure of the employees' loss? In our view, we should take neither the low rate payable by the chartered banks on the savings deposits of their customers, nor the much higher rate which they charge individual

borrowers who finance consumer purchases through the use of credit cards – even though, in today's society, the latter rate is probably a more accurate reflection of how individuals continue their established consumption pattern in the face of temporary shortages of funds. It is more appropriate, in our view, to apply a formula similar to that used in the *Judicature Act*, and this Board in unfair labour practice cases (see: Practice Note 13), and to adopt the chartered banks' prime rate at the time the proceeding is filed as a rough and ready, but nevertheless, reasonable interest rate from which to calculate the loss which the employees have suffered by reason of the respondent's failure to employ them in October, 1981. That prime rate for December 1981, is 17.25 per cent. While this interest rate was unusually high in historical terms, it, nevertheless, reflects the economic reality at the time and, in our view, is a readily available and reasonable benchmark.

32. The circumstances in this case are somewhat different from those in *Hallowell House*, [1980] OLRB Rep. Jan. 35, in that while the breach of the agreement could be said to have begun at least by October 5, 1981 when the employees should have been hired, the company's direct liability terminated a few days later when it relented and hired the grievors or when they got alternative employment. The formula proposed in *Hallowell House* (on which Practice Note 13 is based) is not strictly applicable on the facts of this case. Moreover, the evidence does not disclose precisely when the employees would have been paid had they been hired in accordance with the terms of the agreement, so we cannot determine exactly how long they have been "out of pocket". It seems reasonable to assume, however, that had they been properly hired they would have received the earnings of which they were ultimately deprived no later than the second weekly pay period following their hiring. It would be reasonable therefore to conclude that monies owing would have been paid at least by Friday, October 16, 1981. Accordingly, that is the date upon which our interest calculation is based.

33. Having regard to the foregoing, the Board finds that the respondent has failed to comply with the terms of the collective agreement by which it is bound and, by way of remedy, directs that:

1. the respondent forthwith pay to the trade union, for the benefit of its aggrieved members the sum of \$5,435.28; and, in addition,
2. the sum of \$1,972.98 to compensate them for the loss of the use of funds between October 16, 1981 and the date of this remedial direction.

The total sum, \$7,408.76 shall be payable forthwith.

1128-83-U Canada Packers Inc., Applicant, v. United Food & Commercial Workers International Union, Affiliated with The A.F.L. - C.I.O. and The Canadian Labour Congress (C.L.C.), Local 114P V. L. Derragh, N. Alexander, Perfecto Ng, A. Tinto, F. Shushelski, Steve Rathwell, Ron Isaacs, G. Hillier, E. Smiciklas, J. C. Bobbitt, A. Galea, G. J. Formosa and J. Said, Respondents

Strike - Unfair Labour Practice - Ban on voluntary overtime constituting unlawful strike - Counselling and engaging in unlawful strike found to be violations - Company not having taken legal action in prior instances of overtime ban - Not reason to grant relief in present application - Declaration and direction issued

BEFORE: R. A. Furness, Vice-Chairman.

APPEARANCES: *Patrick Moran, Norm Courtney and Clint English for the applicant; Paul J. J. Cavalluzzo and Bram Herlich for the respondent.*

DECISION OF THE BOARD; September 1, 1983

1. The applicant has applied to the Board for relief under section 92 of the *Labour Relations Act*. The applicant alleged that commencing on August 18, 1983, and continuing, the respondents have authorized, counselled, procured, supported and encouraged an unlawful strike contrary to section 74 of the Act by directing employees not to work overtime. The applicant has also alleged that G. Hillier, E. Smiciklas, J. C. Bobbit, A. Galea, G. J. Formosa and J. Said engaged in an illegal strike contrary to section 74 of the Act.

2. The applicant and the United Food and Commercial Workers International Union (the "International") and certain of its local trade unions; including the United Food and Commercial Workers International Union, Local 114P ("Local 114P"), are parties to a collective agreement which was signed on June 7, 1982, and which remains in effect until May 31, 1984. Local 114P represents certain employees of the applicant at 2200 St. Clair Avenue West in the City of Toronto (the "plant"). The collective agreement covers employees of the applicant at thirteen plants in seven provinces. Mr. V. L. Derragh is the assistant to the director of the International and Mr. N. Alexander is the president of Local 114P. Mr. Ng and Mr. Tinto are chief stewards at the plant. Messrs. Shushelski, Steve Rathwell and Ron Isaacs are stewards at the plant. Messrs. Hillier, Smiciklas, Bobbitt, Galea, Formosa and Said are employees at the plant.

3. The respondent frequently requests its employees to work overtime. At the plant the respondent slaughters hogs and cattle and in addition to its pork and beef facilities operates a pet food department and a nut department. The need for overtime work varies with the demand for the applicant's products. In the immediate past there has been no shortage of employees who were willing to perform overtime work. This has been particularly true with respect to younger employees on the afternoon and night shifts. The applicant experienced no difficulties in obtaining employees willing to perform overtime work at the plant until August 18, 1983. From that date onwards it has encountered difficulties in obtaining employees willing to perform overtime work at the plant.

4. Before examining the evidence with respect to the allegations of the applicant, it

is appropriate to set forth the surrounding circumstances as established by the evidence. The applicant has announced its intention to cease the slaughter of hogs and cattle at the plant at the end of this year. At the commencement of the next year the applicant will perform its cattle slaughtering at a recently acquired location in Burlington and will perform its slaughter of hogs at a newly acquired facility at Kitchener. This will mean a loss of between seven and eight hundred jobs at the plant with employees having less than nine or ten years of seniority being most directly affected by this development. This represents the loss of about one third of the jobs at the plant. The applicant has recently acquired a company at Burlington where it will be slaughtering cattle. This company is known as Tender-Lean Beef Inc. and was formerly not unionized. Recently, Local 114P has obtained bargaining rights for employees at Tender-Lean Beef Inc. in Burlington. Such employees are not covered by the collective agreement referred to in paragraph two. Local 114P is presently engaged in negotiating a collective agreement with respect to certain employees at Burlington. The progress of these negotiations is apparently not to the satisfaction of Local 114P and the employees at Burlington and a strike is in progress by the employees at Burlington.

5. There was apparently a meeting of Local 114P's stewards during the afternoon of August 17, 1983. Subsequently, the following sheet was distributed outside the plant and states:

LOCAL 114P UFCW STRIKE REPORT

On Friday afternoon, Perfecto and I went out to visit our Brothers & Sisters on the picket line at the new Beef Plant. What was happening there makes us feel Union - Company relations have hit an all-time low. The Company has reached to the bottom of their bag of dirty tricks. We found that the 12 truck drivers were offered jobs inside the plant to scab on their fellow employees. Two (brothers) ? were made foremen so that they could cross the picket line. Naturally this excited the people. Trucks were driven through the picket line and in the excitement that followed, one Sister was arrested and we are told, thrown into one of six police cruisers.

Julius Hoebink, the Business Agent in charge of the picket line, has been a personal friend of ours for many years. He has always conducted himself as a true Union leader. We found he has been arrested also and thrown in jail. We went to the jail to bail him out. Asking four officers who were on the picket line what had happened, they told us someone in the plant had charged Julius with scratching his car.

The police had thrown him in jail even though they all said they had seen Julius do nothing wrong.

These tactics by the Company confirm what we all believed in the first place. That the Company did not move the Beef Kill because of the old multi-storied plant but because they thought they could work our people in the new plant *as Paletta did* - like slaves. But our people are firm. To-gether [sic] we will show the Company we are not slaves....

The Company is proposing a contract that would leave a \$5.00 per hour wage gap between Burlington and the rest of Canada Packers.

Fraternally,

N. Alexander, President
Perfecto Ng, Chief Steward.

P.S. WE MUST STAND TO-GETHER [sic]! NO ONE SHOULD WORK ANY OVERTIME FOR CANADA PACKERS.

The Executive Board and
Steward Body.

6. From time to time in previous years a ban had been placed on overtime in the plant. For example, over the last eight to ten years there had been bans on the performance of overtime during negotiations for collective agreements and for other reasons such as anger by employees over the behaviour of foremen. None of the witnesses was able to give evidence that the applicant had commenced legal action in connection with previous bans on overtime.

7. On the morning of August 18, 1983, Mr. Alexander came to the office of Norman Courtney, the supervisor of industrial relations for the applicant's Toronto operations, and informed him that no more overtime would be worked. He also stated that he would be visiting Robert Tomlinson, the production manager at the plant, to inform him of this state of affairs. Subsequently, Mr. Alexander did inform Mr. Tomlinson of this fact. At that time, Mr. Alexander informed Mr. Tomlinson that until negotiations were straightened out at Burlington, Mr. Derragh was calling an overtime ban across the country. In addition, Mr. Ng also left a message for Mr. Tomlinson to the same effect. Since the distribution of the sheet referred to in paragraph five, virtually no overtime has been performed at the plant. Throughout August 18, 1983, senior management received reports from junior management that there was a ban on performing overtime work and that news of this ban had been conveyed to the applicant's employees by the officers and stewards of Local 114P.

8. Messrs. Hillier, Smiciklas, Galea and Said were asked on August 16, 1983, to work during the weekend of August 20, 1983. Initially they agreed to work. After the sheet appeared each of them refused to work on that weekend. Mr. Hillier subsequently stated that now that he knew the circumstances he would not work overtime. Mr. Smiciklas subsequently stated that while he wanted to work overtime on that weekend he would let things cool off for a week before he would work overtime. Mr. Galea subsequently refused to work overtime on that weekend because of the ban on overtime and told the member of management who spoke to him to speak to the steward Ron Isaacs. Mr. Said subsequently declined to work on that weekend and declined to discuss the matter further. Messrs. Bobbitt and Formosa are maintenance employees. Both of them initially agreed on August 16, 1983, to work overtime on that weekend. There was no evidence that Mr. Formosa subsequently declined to work and the approach of his scheduled vacation appears to have disrupted his commitment to work. On the other hand, Mr. Bobbitt subsequently stated that he did not know if he would work on that weekend because of the ban on overtime and in fact he did not work on that weekend.

9. There was no direct evidence that Mr. Derragh was involved in the counselling,

procuring, supporting, encouraging or authorizing the ban on overtime. While his name was referred to in the evidence, the Board is not prepared to find on the evidence before it that the allegations with respect to Mr. Derraugh have been established. The evidence with respect to Mr. Alexander clearly establishes his role in counselling, procuring, supporting or encouraging a ban on overtime. His name appears on the sheet and he announced the ban to members of management in his capacity as president of Local 114P. The name of Mr. Ng, a chief steward, also appeared on the sheet and he was prominent in advising members of management of the ban on overtime. Mr. Tinto informed Joseph Richard not to work overtime and also engaged in disseminating the decision about the ban on overtime to members of management and informed Taris Soltys, the general foreman in nut production, that the ban on overtime was in support of negotiations at Burlington. Mr. Isaacs informed members of management that two mechanics would not be permitted to work overtime. There is not a shred of evidence with respect to the alleged involvement of F. Shushelski and Steve Rathwell in the ban on overtime. There is no evidence that they attended the stewards' meeting or on their views or conduct with respect to the ban on overtime. The applicant made much of the conduct of the presence of Messrs. Tinto and Rathwell in a car outside a plant gate and sought to characterize their presence one evening during the ban on overtime as coercive. The evidence, however, completely fails to establish coercion. The two men chatted in a friendly manner to a member of management and an employee and some employees reported for overtime work during this episode. The respondents did not call any evidence.

10. In viewing the evidence as a whole, the Board is not prepared to find that V. L. Derraugh, F. Shushelski, Steve Rathwell and G. J. Formosa participated in the ban on overtime or that the applicant has established any of its allegations with respect to them. This application is dismissed in so far as it related to V. L. Derraugh, F. Shushelski, Steve Rathwell and G. J. Formosa.

11. The International has been named as a respondent. There is no evidence with respect to any involvement by the International in the ban of overtime or in any of the applicant's allegations. This application is also dismissed in so far as it relates to the International. The applicant also appears to have named the Canadian Labour Congress (C.L.C.) as a respondent. This appears to be as a result of reproducing the description of the trade unions used at the commencement of the collective agreement. The applicant informed the Board that it did not intend to name the Canadian Labour Congress as a party to this application. In these circumstances, this application is dismissed in so far as it applies to the Canadian Labour Congress.

12. The Board now considers whether the ban on overtime was an unlawful strike as proscribed by section 74 of the Act which states:

No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

Section 72(1) of the Act provides:

Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

There was no dispute that the ban on overtime occurred during the period of operation of a collective agreement. In order for the applicant to be entitled to relief it must first be established that the ban on overtime was a strike. If the ban on overtime was a strike, then such a strike would be unlawful under the terms of section 72(1). In section 1(1)(o) "strike" is defined as:

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"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed restrict or limit output.

13. Under article 10 of the collective agreement provision is made for the working of overtime and in article 25 Local 114P has agreed not to authorize, promote, direct, condone or encourage any slowdown or other curtailment or restriction of production or interference with work in or about the applicant's plants or premises. Article 25 further provides that Local 114P agrees that it will not, during the life of this agreement, authorize, promote, direct, condone, or encourage or strike of employees affected by the collective agreement and that employees will not take part in such action. The performance of overtime work has been performed in the past on a voluntary basis and the applicant has obtained the necessary permits under the *Employment Standards Act* for the authorization of hours of work in excess of the hours permitted and as set forth under sections 17 and 20 of the Act. These permits, according to their terms, are required to be posted by the applicant in a conspicuous place where the applicant's employees are engaged in their duties. One of the permits was posted in the personnel office and other permits were placed in a file folder in the office of the applicant's employment co-ordinator. While the applicant apparently did not comply with the terms and conditions of the permits, these matters are more properly referred to the Director of Employment Standards rather than raised before the Board. The apparent non-compliance with the terms and conditions does not, in our view, withdraw the authority granted under the permits and does not change the complexion of the ban on overtime as established in this application.

14. Since 1956, in the decision of the Board in *Harding Carpets Limited* 56 CLLC ¶18,031, the Board has found that the concerted withholding of overtime to limit an employer's output is a strike within the meaning of the Act and that the untimely impositions of such a strike is an unlawful strike contrary to section 72. See, for example, *Beaver Shirt and Sportswear*, [1964] OLRB Rep. July 187; *Hydro-Electric Power Commission of Ontario*, [1969] OLRB Rep. May 169; *Mobil Paint Company*, [1974] OLRB Rep. Oct. 650; *Domtar Packaging Limited*, [1974] OLRB Rep. Dec. 900; and *C & C Yachts Manufacturing Limited*, [1977] OLRB Rep. July 433. In the instant application the ban on overtime constitutes an unlawful strike. By virtue of section 99(2) of the Act, the acts of Messrs. Alexander, Ngant have engaged in an unlawful strike.

15. It was argued by the respondents that because the behalf of Local 114P are deemed to be acts or things done or omitted by Local 114P. The Board finds that Messrs. Alexander, Ng, Tinto and Isaacs and Local 114P counselled or procured or supported or encouraged an unlawful strike of employees of the applicant and that Local 114P authorized an unlawful strike

of employees of the applicant. The Board also finds that G. Hillier, E. Smiciklas, J. C. Bobbitt, A. Galea and J. Said as employees of the applicant have engaged in an unlawful strike.

15. It was argued by the respondents that because the applicant had not taken any legal actions in connection with previous unlawful strikes that the Board ought not to exercise its discretion in favour of the applicant and decline to issue a declaration and/or a direction. The fact that an employer may have chosen to approach its labour relations in the past without recourse to legal proceedings against Local 114P and its employees does not preclude it from seeking relief before the Board. There has clearly been no detrimental reliance on the part of the respondents because of the previous forbearance by the applicant. The respondents have embarked on a course of action notwithstanding the terms of the collective agreement and the provisions of the Act. While the Board sympathizes with the situation of one third of the employees of the applicant and understands the emotions which are unleashed when collective bargaining for the facility at Burlington is not coming up to the expectations of Local 114P, the present conduct of instituting a ban on overtime and violating the Act cannot be ignored by the Board. The applicant is entitled to relief under section 92 to the extent that it has established its allegations before the Board. The Board has considered the request by the respondents that the Board merely issue a declaration. The Board notes that there was no mention by the respondents of a willingness to lift the ban on overtime in the event that the Board found that the respondents had engaged in an unlawful strike. In addition, the proclaimed position of some of the respondents was that the ban on overtime would remain. In these circumstances, the Board is prepared to issue a declaration and a direction. The applicant requested more extensive relief in its application than a declaration and a direction. The additional relief consisted of a request for damages and a mailing of letters and copies of this decision to all the employees. The Board is not prepared to grant this additional relief. There was no evidence with respect to the amount of the applicant's alleged losses and, in our view, the issuance of a declaration and a direction is a sufficient remedy in this application.

16. Having regard to the foregoing, the Board makes the following declarations and directions:

1. United Food and Commercial Workers International Union, Local 114P, has authorized an unlawful strike of employees of Canada Packers Inc.
2. Norman Alexander, Perfecto Ng, A. Tinto and Ron Isaacs as officers, officials or agents of the United Food and Commercial Workers International Union, Local 114P, have counselled or procured or supported or encouraged an unlawful strike of employees of Canada Packers Inc.
3. G. Hillier, E. Smiciklas, J. C. Bobbitt, A. Galea and G. Said as employees of Canada Packers Inc. have engaged in an unlawful strike.
4. United Food and Commercial Workers International Union, Local 114P, shall cease and desist from authorizing an unlawful strike of employees of Canada Packers Inc.
5. Norman Alexander, Perfecto Ng, A. Tinto and Ron Isaacs as offi-

cers, officials or agents of the United Food and Commercial Workers International Union, Local 114P, shall cease and desist from counselling or procuring or supporting or encouraging an unlawful strike of employees of Canada Packers Inc.

6. G. Hillier, E. Smiciklas, J. C. Bobbitt, A. Galea and G. Said as employees of Canada Packers Inc. shall cease and desist from engaging in an unlawful strike.
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0290-83-U International Woodworkers of America Local 2-69, Complainant, v. Consolidated Bathurst Packaging Ltd., Respondent

Duty to Bargain in Good Faith – Unfair Labour Practice – Plant closure announced six weeks after collective agreement signed – Failure to disclose “highly probable” closure amounting to misrepresentation – Evidence giving rise to rebuttable presumption of de facto decision prior to signing or deliberate postponement of decision until after signing – No continuing duty to bargain during term of collective agreement in Ontario

BEFORE: George W. Adams, Q.C., Chairman, and Board Members W. H. Wightman and B. F. Lee.

APPEARANCES: *Paul J. J. Cavalluzzo, David I. Bloom and Bram Herlich for the complainant; and Michael Gordon and Ronald Gruber for the respondent.*

DECISION OF GEORGE W. ADAMS, Q.C., CHAIRMAN; September 30, 1983

1. This is a complaint filed under section 89 of the *Labour Relations Act* alleging violation of sections 15, 41, 50, 64 and 66 of the Act. Essentially, the matter centres on an allegation that the respondent violated the *Labour Relations Act* by failing to disclose during bargaining that a particular plant was to be closed. There is much in common between the parties.

2. The complainant is the bargaining agent for all employees of the respondent at its Hamilton plant with the exception of foreman, those above the rank of foreman, office staff, cafeteria staff, art department staff, design department staff, technical and development department staff, industrial engineering department staff, production schedulers, quality control department staff, waste co-ordinators and watchmen. Until April 26th, 1983 the respondent operated five plants in Ontario, namely Etobicoke, Hamilton, Whitby, St. Thomas and Brantford. Various locals of the International Woodworkers of America (I.W.A.) hold the bargaining rights at all five locations. The practice has been for the locals at Etobicoke, Hamilton, Whitby, St. Thomas, Ontario; St. Laurent and Montreal East, Quebec; to bargain jointly for the negotiation of renewal collective agreements on behalf of their various members. The collective agreement between I.W.A. Local 2-69 and Consolidated Bathurst, Hamilton expired on December 31st, 1982. On or about November 2nd, 1982, Mr. W. Pointon, Secretary-Treasurer of the I.W.A., Regional 2, wrote to Mr. R. Gruber, Manager of Industrial Rela-

tions, Consolidated Bathurst, in which he expressed the desire of the union to open negotiations. Negotiating meetings took place on December 15th, January 4th, 5th, 6th and 7th. Present at these meetings, on behalf of the union, were J. M. Bedard, D. Chaisson, W. Poin-ton, P. Collin, and all of the members of the various committees from the other various local unions involved in the said negotiations. Present on behalf of the company were Mr. Gruber and all of the plant managers. A memorandum of settlement was reached on January 13th, 1983. During the negotiations the provision in the collective agreement regarding plant closure and severance pay was not changed from the previous agreement. At no point during these negotiations did the company indicate that the Hamilton plant would or might be closed during the term of the collective agreement. In its demands, the union sought the following provision with respect to plant closure:

In the event the company decides to cease, in whole or in part its operation at the location covered by this agreement, regular employees affected will be given a minimum notice of two months. A regular employee holding seniority rights, whose employment with the company ceases because of plant closure, in whole or in part, will be paid a severance allowance based on the formula of two weeks' pay for each year of service or fraction thereof. The allowance will be paid upon severance.

In the event the company relocated any operation, in whole or in part, the employee so affected shall have the right to exercise full seniority and recall rights in the new location. It is understood that this particular provision shall not apply to any Consolidated Bathurst operation currently under agreement with the International Woodworkers of America.

Any employee affected by any closure outlined above shall have the right to take a job elsewhere following closure announcement and at the same time, retain his eligibility to all entitled severance pay which shall be paid to him immediately upon his departure.

In the event of a lockout or a strike, and the company decides to close plant, severance pay will be paid.

This provision, however, was unilaterally dropped from the demands of the union during bargaining and the following provision of the collective agreement was simply renewed:

Article 18.26 Plant Closure

In the event of the planned closure of the entire plant, the company will notify the union as soon as possible of such plans but in any case not less than two (2) months prior to the closing date.

18.27 Eligible employees terminated as a result of the plant closure will receive severance pay as follows:

(a) An eligible employee with one (1) to ten (10) years of service will

receive twenty (20) hours pay for each year of service at the employee's current hourly rate.

- (a) An eligible employee with more than ten (10) years of service will receive twenty (20) hours pay for each year of service up to and including ten (10) and forty (40) hours pay for each additional year of service at the employee's current hourly rate to a maximum of one thousand and forty (1,040) hours total severance pay.

18.28 In order to be eligible for severance pay under this Article, employees must be on payroll at the time of the announcement of plant closure, have one or more years of service and remain in the employ of the Company until the closing of the plant or until the employee's services are no longer required. Employees eligible for any early retirement benefits proposed by the Company will be entitled to either the early retirement benefit or the severance pay.

18.29 Employees eligible for severance pay as provided by Government legislation will receive either the Government legislated provision or the Company severance pay provision, whichever is greater.

3. On or about March 1st, 1983, at about 2:00 p.m. at a meeting with the union committee, Mr. Beettam, the area manager, Consolidated Bathurst, announced that the Hamilton plant would cease operations as of April 26th, 1983. The union alleges that at this meeting Mr. Beettam said that had it not been for the strike, the plant would have closed last year. The respondent takes the position that he said "had it not been for the strike the plant might well have been closed last year". Also present at the meeting on behalf of the company were Mr. Gills and Mr. Gruber. On or about March 4th, 1983, a meeting took place between Mr. Gruber, Mr. Gills and Mr. Bell and members of the union committee. The union alleges that Mr. Gruber said that if the other companies in the corrugated industry had not gone on strike that the Hamilton plant would have closed in 1982. The company takes the position that Mr. Gruber stated that the plant "...probably would have been shut down last year had it not been for the industry-wide strike".

4. In April of 1983 The Honourable John Munro, Member of Parliament, whose riding embraces the Hamilton plant, attempted to set up meetings between the union and the company. He also met with company representatives in Montreal. It would also appear that other politicians including The Honourable Russell Ramsay, Minister of Labour, Province of Ontario, Mr. Bob MacKenzie, M.P.P., Ann Jones, Sheila Copps, M.P.P., and Robert Morrow, Mayor of Hamilton, met with company officials with respect to the plant closing. On or about April 26th, 1983, the officers of the union sent an offer to purchase the plant to the company which was later rejected.

5. The respondent denies that any of its actions or conduct relating to the Hamilton plant closure were in violation of the *Labour Relations Act* or the collective agreement between it and the complainant. The respondent states that no decision was made with respect to the closing of its Hamilton plant until the 25th of February, 1983 and that such a decision was neither contemplated nor known at the time the company engaged in collective bargaining with the trade union. The complainant trade union takes the position that the respondent had

made a decision to close the plant prior to the completion of bargaining and that it failed to disclose this information in violation of the *Labour Relations Act*. Alternatively, the complainant alleges that even if a firm decision to close the plant had not been made prior to the completion of bargaining, the respondent was under a duty to disclose its thinking with respect to the potential closing of the Hamilton plant before executing the collective agreement. Finally, the complainant submits that there is a "mid-term" duty to bargain or consult with the trade union where a decision is taken by an employer which significantly affects critical job interests of bargaining unit employees. The complainant seeks a declaration, postings in local newspapers, a make-whole remedy, an order that the plant be re-opened, a direction that the respondent negotiate with the complainant regarding the closure, that a hiring preference be given to all employees of the bargaining unit in all other facilities owned and operated by the respondent in Ontario, an order that the respondent pay moving and other expenses relating to the relocation of employees who obtain employment in such other facilities, and an order that the respondent compensate fully the remaining employees pursuant to the collective agreement until such time as the employee obtains reasonable alternative employment or the expiry of the existing collective agreement, whichever occurs first.

6. It was agreed that newspaper reporters could be called by the complainant to give the following evidence. On February 14th, 1983 the *Spectator* under the title "Lay off Sparks Shut-Down Rumor at Carton Plant" published an article reporting "rumors of permanent lay offs and even plant closures...swirling around a Hamilton factory after the lay offs of about 80 employees over the last two months". General Manager, Don Beettam is reported to have said "there are always rumors going around in the market place about one thing or another" and "I am not in the Corporate Head Office. I am just responsible for two plants in the market". Again, on March 2nd, 1983 the *Spectator*, under the title "140 More Jobs to Disappear" published an article reporting the announcement of the plant closure slated for April 26th. The article, in part, read:

Hamilton general manager Don Beettam was not available for comment, but spokesman Denise Dellaire said the cardboard box industry is plagued with overcapacity.

The possibility of closing the plant has been under study for a number of months, she said.

A decision has not yet been made on how the plant will be disposed of, but some of its new machinery will probably be transferred to other company plants, Ms. Dellaire aid.

Montreal-based Consolidated-Bathurst has seven other corrugated container plants in Canada, including three in Ontario in Etobicoke, St. Thomas and Whitby

Some sales and office staff now employed in Hamilton will be transferred to other company facilities and other employees will be eligible for special early retirement benefits, the company said.

The remainder will receive severance pay amounting to a half-week's pay for each of the first 10 years of service, and a full week's pay for each year above 10 years, up to a maximum of 26 weeks' pay.

Consolidated-Bathurst is currently exploring the possibilities of merging its corrugated box plants with those of MacMillan Bloedel Ltd. of Vancouver to form a new, joint-venture company, but any decision will come too late to save the Hamilton plant.

Ms. Dellaire said the proposed merger "has nothing to do" with the Hamilton plant closing.

Consolidated-Bathurst, which also makes and sells pulp, lumber and glass and plastic packing products, had a \$53.4-million profit last year, down 47 percent from a \$112-million profit in 1981.

The company has about 16,500 employees in Canada, the United Kingdom and Germany.

The Cavell Avenue plant was purchased by Bathurst Paper Ltd. in 1946 from Kraft Containers Ltd. Its name was changed in 1967 when Bathurst merged with Consolidated Paper.

[emphasis added]

7. In the Spectator of March 14th, 1983 under the title "Union Wants Probe of Plant Closing" Consolidated-Bathurst spokesman, Denise Dellaire, was reported to have said that "the Hamilton plant was relatively well off in 1982 largely due to a six month strike that closed most of the corrugated box industry, except for Consolidated-Bathurst and a few independents". She went on to say "had it not been for the strike it is conceivable the Hamilton plant would have closed last spring". It was also agreed that the respondent could have called a newspaper reporter to testify that on April 29th, 1983 the Hamilton Spectator carried a story under the heading "Writs filed against Consolidated-Bathurst" in which it was reported that Walter Lopata, Vice-President of Local 2-69, said "the bargaining in bad faith charge had been filed if only to get better severance pay for union employees and possible relocation of some workers".

8. By memorandum dated December 15th, 1982 it was agreed that the company's final proposal would be subject to a ratification vote by secret ballot and that if a majority of the eligible employees in the six company plants voted to accept the company's final proposal, it would be deemed to be ratified. From the evidence of Mr. Pointon we are satisfied that there was absolutely no discussion of the economic situation of the Hamilton plant during negotiations. The complainant did not ask whether such problems existed or whether the company was contemplating major changes. The company did not raise any significant financial problem faced by the Hamilton plant or reveal any change being contemplated. Mr. Pointon testified that the trade union did not ask for financial information about the Hamilton plant because the company did not at any time during bargaining plead an inability to pay. A strike involving Domtar Packaging, MacMillan Bloedel, Kruger Paper and CIP. This strike was not settled until approximately Christmas of 1982 and there was little doubt that it would set the

pattern for Consolidated-Bathurst. Thus, both the complainant and respondent wanted to know where the industry settlement would be before they reached agreement. Accordingly, while the complainant gave notice to bargain on November 1st, 1982, the first meeting between them was not until a conciliation meeting was held on December 15th and at that meeting the complainant sought a no-board report in order to put maximum pressure on the respondent when the industry pattern became clear. The next meetings between the parties were not until the January dates referred to above and during which a memorandum of agreement was achieved. Mr. Pointon, for the union, denied being aware of rumors of a potential plant closing at the time of bargaining. It would appear, however, that in 1978 the respondent threatened to close the Hamilton plant if changes to an incentive scheme it desired were not made. Indeed, it had made a decision to close the plant after it had been struck and subsequently reconsidered this decision when the employees agreed to return to work and to accept the changes to the incentive plan.

9. The average age of the 180 employees in the bargaining unit is between 40 and 65 years of age. Over 100 of the employees fall within this category and over 110 of the employees have 20 years of service with the company. Mr. Rudy Oliverio testified that had the company revealed its intention to close the plant the trade union would have taken a completely different strategy during negotiations. Mr. Oliverio had denied that any economic problem facing the plant was raised with the trade union and in fact pointed to a letter sent by D. E. Beettam to all bargaining unit employees wishing them "a very Merry Christmas and a prosperous New Year" and stating "I have no doubt that the objectives met this year will provide a strong base for our goals in the future". Mr. Oliverio stated that the following article was published in the St. Thomas Timmes on Friday, February 4th, 1983 under the heading "Two-thirds of workers at Bathurst now laid-off". It read:

The layoff of 39 employees at Consolidated-Bathurst Packaging Ltd. Thursday brings to 100 the number laid off during the past three weeks, said Verne Warren, president of Local 2-337 of the International Wood Workers of America.

Mr. Warren said the latest layoff means two-thirds of the company's 150 employees have been laid off since signing a three-year agreement with the company in January. However, he said he does not believe the agreement has anything to do with the present employment situation at the plant.

He said he is certain the layoffs were motivated by the overall economic outlook in general - "we're all sure of that".

Bathurst employees, however, are also concerned about unconfirmed rumors the plant may merge or "pool its resources" with other financially-stricken corrugated plants in the province, he said. *As well, they are concerned that one of Bathurst's four Ontario plants is about to be closed-down, a plant located in Hamilton, Mr. Warren added.*

The St. Thomas plant suffered through a period of layoffs in 1982, when about 70 workers were laid off, some of whom were out of work for up to nine months, he said.

Mr. Warren said the company feels the latest round of layoffs will be short term.

Plant Manager Allan Stapleton could not be reached for comment this morning.

[emphasis added]

10. Around December 17th and 24th, 40 to 45 employees were laid off at the Hamilton plant and given official notice under the *Employment Standards Act*. Another large lay off was advised in a notice dated January 19th, 1983 to be effective March 16th, 1983. Mr. Oliverio received the following notice dated March 1st, 1983 dealing with the actual closure of the plant. It reads:

I regret to advise that the operation of our Hamilton Plant will be discontinued on or about April 26, 1983. The decision to close the Hamilton Plant was an extremely difficult one for us to make, particularly because of the effect it will have on our employees. *However, over the past several years, the viability of the Hamilton Plant has been continuously under review mainly because of increasing costs and serious loss situations. Given the present very difficult economic and business situations we can no longer continue to operate the Hamilton Plant.* Accordingly, this letter constitutes official Notice of Lay-off pursuant to the provisions of the Employment Standards Act.

We are advising the Provincial Government of this situation and in an effort to assist in and help minimize the effects of the closure, we are indicating to them that we are prepared to co-operate fully in any pertinent programs that would assist our employees.

Meetings will be held between now and March 11th on an individual basis with all employees to advise you of specific details and answer any questions you may have.

[emphasis added]

11. The news release provided by Consolidated-Bathurst on the plant closing is also dated March 1st, 1983 and took the following form:

Toronto - Consolidated-Bathurst Packaging Limited today advised supervisors and employees at its Hamilton corrugated container plant that the Company will close that plant permanently on April 26, 1983. Approximately 140 employees currently at work will be affected. The Ontario Ministry of Labour has been advised of the shutdown.

The closure is attributed to the fact that the operation has accumulated serious losses over the last several years. "Under present markets and difficult competitive conditions" a Company spokesman explained "and with no improvement in prospect, there is no way we can continue to operate this plant".

The decision was inevitable, the Company said, because of mounting costs which it has not been successful in containing in spite of some \$2.8 million spent over the last five years on new machinery, updating plant equipment and on major repairs.

The stated number of employees affected does not include certain sales and staff positions that will be relocated to other Company facilities. A number of employees will be eligible for special early retirement arrangements and other employees will qualify for severance pay.

Consolidated-Bathurst expects that the cost of the closing will be approximately \$2 million. The Company has assured its employees and the government of its full cooperation in pertinent relocation or retraining programs that may be available.

The plant on Cavell Avenue is one of eight corrugated container plants operated by Consolidated-Bathurst from Winnipeg to Saint-John. It was purchased by Bathurst Paper Limited in 1946 from Kraft Containers Limited.

[emphasis added]

12. Mr. Oliverio testified that a meeting with the company to discuss the closing lasted 30 minutes during which severance and pension entitlements of affected employees were discussed. The company indicated that it was not thinking about relocating employees at that time. Oliverio testified that he and others asked "why this plant?" and Mr. Gruber replied "if it was not for the strike the plant would have been closed last year". The parties met again on March 4th and the union indicated its willingness to grant concessions to avoid the plant closing. Mr. Gruber replied that if the company had wanted to "talk concessions" it would have approached the trade union. However, it was the decision of head office in Montreal that the matter was "final and binding". Oliverio testified that at a meeting on March 7th, 1983 with plant manager, Gills, and others, Mr. Gills said he knew of the decision to close the plant one month earlier. Oliverio further testified that the company refused to meet with both union officials and politicians on at least two occasions following the announcement of the plant closure. Since the 1978 negotiations there was the intervening negotiations leading to the 1980-1982 collective agreement. Mr. Oliverio agreed that in September of 1981, after Mr. Beettam had been appointed as the new plant manager, Mr. Beettam attended a meeting with the union and indicated his intention to "turn the plant around and make it viable". Subsequent discussions between the complainant and respondent took place with respect to a number of work practices and Mr. Oliverio agreed that considerable money had been expended on the plant during the last few years "to make it viable". Mr. Gruber took notes of these union-management meetings during the months of September and October of 1981 and January of 1982. From these memoranda it would appear that the union was concerned about "the plant going down" in September of 1981 and Mr. Beettam advised that "no decision had been made to close the plant at this time". He said that the company wanted to turn it around but if this was not possible further decisions would be made. In October of 1981 employees committed themselves to a productive work effort and raised concerns that everytime something went wrong they were threatened with being put out on the street. The company repeated that the plant was in trouble and that the company was looking at a loss of \$2 million. The company however agreed not to threaten employees and noted that the company was

still putting capital into the plant. At the same time it cautioned that the company could not continue to throw "good money after bad". On January 8th, 1982 a joint management-labour meeting reviewed 1981 and upcoming 1982. It was reported that the plant lost \$1.3 million in 1981 and the reasons related to "volume, sales, price, quality, waste, etc.". \$480 thousand in capital had been invested in the same year. It was reported that capital was "tight" and that there was a 3 month moratorium on spending. There was also a one month delay on all salaried increases which was pointed to as an "indication of things to come in 1982". The company noted that productivity had improved but there were still some areas which needed improvement. By May of 1982 approximately 25 employees were on lay off and the company was operating only two shifts and on a four-day work week. However, as the industry-wide strike began in May, Consolidated-Bathurst experienced a "boom" with the Hamilton plant and all other plants operating at full three shifts-seven days a week capacity. Oliverio recalled Gruber saying during negotiations that a contract was needed because customers were watching and they were nervous. He further testified that Beettam's message in 1981 was not new in his 35 years of experience with the company. Walter Lapada testified and confirmed Oliverio's evidence with respect to the meetings of March 1st and 4th with the company. His recollection of what Beettam and Gruber said on those days was similar to Oliverio's recollection. He further confirmed the statement of Gills on March 7th, 1983. He pointed out that the company during negotiations had agreed "to fix" a number of things about the plant and that it was very slow in undertaking these items in late January and February.

13. Mr. J. E. Souccar, Senior Vice-President, North American Packaging for Consolidated-Bathurst Inc. testified. He was called by the company but subpoenaed by the complainant trade union to produce all documentation pertaining to the plant closure. The only two documents produced and said to exist were the following excerpts from a minute reporting a directors' meeting of February 25th, 1983 and a resolution dated June 16th, 1983. They read:

Excerpt from the Minutes of the Directors' Meeting held on February 25, 1983:

"It was noted that the proposal also reflected the closing of the Hamilton plant of the subsidiary, Bathurst Paper Limited. Mr. Stangeland noted that management is recommending that, because of serious losses accumulated over the last several years and mounting costs despite investment of \$2.8 million over the last five years on new machinery, equipment and repairs, the Hamilton plant should be closed down. This closing, which is expected to cost approximately \$2 million, is to be carried out even if the proposed joint venture does not take place and Mr. Stangeland requested approval of the board to close the Hamilton container plant on April 26, 1983. The land and buildings of the Hamilton plant will not be assets of the joint venture.

On motion, duly made and seconded, it was unanimously

RESOLVED:

THAT the closing on April 26, 1983, of the corrugated container plant of the subsidiary, Bathurst Paper Limited, in Hamilton, Ontario, is hereby approved."

CONSOLIDATED-BATHURST INC.RESOLUTION

“On motion, duly made and seconded, it was unanimously

RESOLVED:

THAT the closing on April 26, 1983, of the corrugated container plant of the subsidiary, Bathurst Paper Limited, in Hamilton, Ontario, is hereby approved.”

Mr. Souccar testified that the Vice-President and General Manager of the Container Division, Mr. Ted Haiplik, reports to him and he had come to the conclusion that the plant closure was a necessary action. Mr. Souccar testified that Mr. Haiplik advised Mr. Souccar of this recommendation in the “first or second week of February during one of their regular meetings”. In terms of corporate hierarchy, Mr. Gruber reports to Mr. Haiplik, Mr. Haiplik reports to Mr. Souccar and Mr. Souccar reports to Mr. Stangeland, the President of the company. The Board of Directors meet during the last week of every month and they require four to six days’ notice of the agenda. Mr. Souccar agreed with Mr. Haiplik’s recommendation and in turn made the recommendation to Mr. Stangeland who then with Mr. Souccar placed the matter before the Board of Directors Meeting in the end of February.

14. Mr. Souccar is President of Domglass, a subsidiary of the respondent, and as of April 1982 was given the additional responsibilities of Senior Vice-President, North American Packaging for Consolidated-Bathurst Inc. He said that when he took over the company was experiencing a new economic environment in that the “recession was manifesting itself”. He concluded that there was a need “to rationalize in order to stem losses”. Market growth and development had to be reversed. There was considerable over-capacity in the industry and increasing competitive pressures from U.S. competition. He said that the company had to make sure its over-all operations were structured to meet this competitive challenge. He testified that there were at least two loser plants in Ontario in April of 1982 and the Hamilton plant was the “bigger loser”. He testified that over-capacity was absolutely clear and that he set into operation a rationalization program. He said that this plan was to be completed by September of 1982 and that he had a number of analysts working with him under the direction of the Senior Vice-President of Corporate Planning, a Mr. Suutari. Later in his evidence he testified that it was Mr. Haiplik’s responsibility to make the decision with respect to a plant closure and to in turn recommend this course of action to him. He said it was left to operating people like Ted Haiplik to come up with an analysis on how to solve the over-capacity problem. He described the over-capacity situation as one where the availability of business the company could profitably obtain was insufficient to maintain an adequate level of operation. He pointed out that the activity of the company was very capital intensive resulting in the burden of overhead being too significant. He testified that the magnitude of losses was too great. He further concluded that the short and long term needs of the Ontario market could be handled by four plants and that the company could not see how it could create enough business to maintain five plants.

15. However, no decision to close a plant had been made prior to the strike in the corrugated industry in June of 1982 and after that point in time Consolidated-Bathurst began to

operate at full capacity. After the conclusion of the strike, the respondent wanted to see the effects of the following resumption of operations throughout the industry. It wanted to know what its market share would be or, stated another way, what portion of the additional work it received during the strike it would retain. Mr. Souccar testified that the company was not in a position to determine to what extent the necessary support from the market to run operations at an acceptable level in all of its plants would be until after the strike and until after it had a collective agreement. With respect to this latter point he testified that until the company had a collective agreement it would not be in a position to go to its customers and profess to be a "reliable source". He said no decision could be made until the situation had become normalized "in every sense of the word".

16. Souccar testified that once the collective agreement was executed "a number of things happened quickly". First, the recession was still there and looming longer. Secondly, it became apparent that Canadian customers had made arrangements with U.S. suppliers of some duration which contributed to them "turning off the tap to Consolidated-Bathurst quickly". Thirdly, the result was that Consolidated-Bathurst lost market support within a few weeks of the strike. Souccar testified that it took four or five weeks before the company could make the decision to close. The Hamilton plant was selected because of "the logistics of the market"; the amount of investment required to modernize it; and the relationship of market to products of each of the Ontario plants.

17. Souccar, also in 1982, began to consider desirability of affecting a merger with another packaging company in response to the industry's over-capacity. Discussions were therefore commenced with MacMillan Bloedel prior to the industry strike but delayed indefinitely thereafter. Discussions resumed in January and a merger agreement with MacMillan Bloedel was entered into in June of 1983. However, Souccar stressed that the decision to close the Hamilton plant was not tied to its decision to enter into a joint venture with MacMillan Bloedel. Discussions with MacMillan Bloedel resumed in earnest on January 13th, 1983 but no information, Souccar stressed, was passed onto the operating groups because nothing at that time had been agreed to. Souccar testified that the company, between November 2nd, 1982 and January 13th, 1983 was not considering closing the Hamilton plant because it had no need to contemplate that action having regard to the benefits to Consolidated-Bathurst flowing from the industry-wide strike. By letter dated April 6th, 1982 Mr. Souccar wrote to The Honourable Russell H. Ramsay, Minister of Labour, explaining the company's decision to close the Hamilton plant in the following terms:

Dear Mr. Minister:

This letter is further to our meeting of March 31, 1983 and the major points raised in connection with the closing of our Hamilton plant.

As we indicated during our meeting, the corrugated industry has been plagued by over-capacity, lagging productivity and unsatisfactory margins for several years. Our Hamilton plant has lost money consistently and, despite considerable capital investments, the plant simply could not attain acceptable contribution levels. Several factors contributed to this situation: lack of volume, high upkeep costs, proximity to markets, transportation costs and extremely competitive market conditions, to name a few. The recession in the 1981-82 period seriously aggravated this condition

and we decided that the rationalization of our Ontario capacity was desperately needed in order to meet the new, strong competitive challenge facing our company and to contain further increasing losses.

The corrugated industry strike during the latter half of 1982 provided some temporary relief and we were able to substantially increase our market share and the Hamilton plant operated at full capacity during this period.

Following the settlement of the strike, we were no longer able to sustain proper operating levels and it became urgent to once again give consideration to close permanently one of our four Ontario facilities.

That decision was made completely independent of the potential joint venture with MacMillan-Bloedel.

Early during the course of the closure, we indicated that, following the recall of employees on layoff at our other corrugated plants, we would give consideration to any Hamilton employees who made application. Furthermore, we indicated that should any employees be hired at other locations, they would be given full recognition by the company for all past service at the Hamilton plant. We understand that this same consideration has not been extended to them by the Union as far as bargaining unit seniority is concerned. Also, we indicated to representatives of both the Federal government and your Ministry that we were anxious to participate fully in a relocation committee for the employees of the Hamilton plant. However, again, we understand that such participation has not yet been fully expressed by the Union.

The issue of differences between severance and pension provisions between salaried and union employees was also raised. As explained, insofar as unionized employees are concerned, the areas of wages, benefits and working conditions are subject to negotiations and contractual agreement. Quite frequently, wages have taken precedence over benefit improvements in negotiations.

Over the past three years, unionized employees have enjoyed higher wage increases and benefit improvements than salaried employees whose benefits have remained relatively static and who are currently under a total salary freeze for a minimum of six months. We have applied both our contractual and salaried company policies on a fair and defensible basis consistent with similar instances in the past.

Concerning benefit coverage, the company cannot be expected to provide continuing benefits to severed employees. Employees currently on weekly indemnity and long term disability will continue to be fully covered which, in the case of the latter, also includes full life insurance coverage until retirement age.

Also, all employees have the option to convert their full amount of current life insurance to whole life coverage at current rates provided they exercise their options within thirty days from the date of leaving our employ. Insofar as employees qualifying for special early retirement benefits are concerned, the company will continue to pay half of the premium cost for OHIP coverage to age sixty-five.

As discussed, this matter has been under review for a considerable period of time and action was taken only after very careful examination of all alternatives possible. As a responsible corporate citizen, we have allocated both financial and managerial resources to try to avoid this drastic step. However, given the situations outlined earlier, we have concluded that the Hamilton plant is not viable, both in the short and the long term.

The decision to terminate operations at the Hamilton plant has been a difficult one, particularly as it affects the employees involved but, given current legislation and practices, we feel that our policies are a fair and equitable attempt to try to minimize the impact of this decision on our employees.

[emphasis added]

A subsequent telex from W. I. M. Turner, Chairman and Chief Executive Officer of the respondent company, was sent to the Minister of Labour on April 26th, 1983. It reads:

In reply to your telex of April 25th this will advise and confirm earlier communications to you that the company is not prepared to delay the planned closing of the Hamilton packaging plant. *The industry as well as ourselves are facing considerable overcapacity in the corrugated container market in Ontario due to technical innovations and other reasons that have thoroughly been discussed with you. The problem is not solved by any programs that keep the most inefficient capacity alive. Thus the company is not prepared to consider the sale of the operation as a going concern.*

Furthermore the corrugator has already been sold and the other equipment is committed for other use and/or sale. Under all the circumstances, we are declining attendance at your suggested meeting on Wednesday, April 27th, commencing at 3:30 p.m.

[emphasis added]

18. A final letter was sent to the Minister of Labour dated June 2nd, 1983 over the signature of T. O. Stangeland, President and Chief Operating Officer of Consolidated-Bathurst Inc. It reads:

Dear Mr. Minister:

During the course of our meeting on April 28, 1983, we indicated that we would review our decision concerning first refusal rights for employees displaced as a result of the Hamilton container plant closure at

our other container plant locations. I have thoroughly discussed this matter with our management who have indicated that they basically will be adhering to the following procedures which will protect on one hand the recall procedure for employees on layoff at these other container plants and also will recognize fully the background of employees from our Hamilton plant. In cases where any such former employees are hired, they will be given recognition for past service at the Hamilton plant for the purposes of calculating vacation entitlement and service awards at the new locations. All other matters, including probationary period and seniority will continue to be governed by the terms of the appropriate collective agreement.

As you may be aware, we are currently participating in a Joint Manpower Adjustment Committee that has been established to assist employees locate other employment. Furthermore, the Company has also agreed, on the recommendation of your Ministry, to incorporate the Mohawk Occupational and Educational Readjustment Program into this Committee.

19. On cross-examination, Mr. Souccar admitted that the company recognized the industry-wide strike was not going to last forever. He testified that the plans for rationalization took the form of "discussions and reviews" but "not necessarily in writing". More specifically he testified that "nothing was in writing before February 25th, 1983 concerning the Hamilton closure". Mr. Souccar admitted that he saw Mr. Haiplik on a regular basis and that Haiplik was monitoring the situation in early 1983 but it took three or four weeks to analyze matters. He said business dried up very quickly and that by January 19th it was "clear business was not forthcoming". He said it was apparent that business was in a dramatic downturn. Both union witnesses disagreed with this observation and testified that substantial lay offs began in mid-December and continued throughout. He testified that Mr. Haiplik gave him the \$2 million figure for the price tag of closing and that Haiplik would have been receiving or preparing weekly reports and having daily discussions on the situation. Souccar testified that it was not possible for him to advise the union of a decision that had not been made yet or about which approval had not been obtained from the Board of Directors. He said one didn't speculate on matters of plant closing and that the complexity of alternatives had not been assessed prior to the conclusion of negotiations. He said that Mr. Gruber found out about the decision when everyone else found out. Souccar also advised the Board that an additional problem facing the industry was a price drop in the U.S. in 1982 from \$300 a ton to \$235 a ton. This increased the attractiveness of the American containers. He said the company had a healthy backlog of orders in December but by early in January cancellations had begun.

20. Donald Beettam has responsibility for the St. Thomas and Hamilton plants. He testified that from 1978 to September of 1981 productivity in the Hamilton plant had dropped by 25 to 30%. There was also the problem in the market place. He was asked about rumors of plant closings in December of 1981 and responded, as indicated above, that it was his purpose to try and turn the plant around. By January of 1982 the plant was facing a steep recession; a four-day work week was instituted; one shift was in operation; and directions came from Montreal to "tighten belts". Nevertheless productivity had increased and waste was declining. However, the company was still running 25% off budget and by May of 1982 had incurred a \$500,000 loss. The industry-wide strike affected 75% of the market. Before the strike Consolidated-Bathurst had 19 to 20% of the market and during the strike this market

share climbed to 27 or 28%. However, the company did not take on new customers but increased its share of common customers, a feature of the industry described in a recent case of this Board dealing with picketing. See *Consolidated-Bathurst*, [1982] OLRB Rép. Sept. 1274. Beettam testified that the industry-wide strike established just what the total capacity of the Ontario plants were and demonstrated to the company that running "full out" in its plants was very viable. The result was longer and more consistent runs and a dramatic rise in productivity. Beettam testified that it was the company's "hope" to maintain some of the increase in market share. However, in early December it became apparent that a great deal of business had been committed to U.S. suppliers. By mid-November the Hamilton plant was running a lot of inventory and orders started to decline as December commenced. He testified that there was "some concern by our customers that our contract was due on December 31st, 1982". A significant lay off was effected December 23rd and a number of dies went to other plants after Christmas. He testified that the impact of the settlement was felt by the tail end of December. Orders were cancelled and customers began to work off their heavy inventories. The inventories apparently were built up as an insurance policy against a continued industry-wide strike together with the involvement of Consolidated-Bathurst when its contract expired. Beettam testified that the decision to lay off communicated January 19th was made the week before. He advised that the industry was seasonal and that orders fluctuated even on a daily basis. The industry was highly competitive and price levels had been falling since 1981 due to a volume of supply available in the U.S. at considerably lower prices. He testified that by January 17th the company was booking less than a million square feet per day, the minimum booking to man a one shift operation.

21. Mr. Beettam reports to Mr. Haiplik but said he was not aware of any decision to close the plant prior to January 17th. He said that on February 3rd or 4th he had a discussion with Mr. Haiplik about "his feelings on the western Ontario market". He advised or they decided that the company should take "a hard look at the Ontario market with a possibility; and directions came from Montreal to "tighten belts". Nevertheless productivity had increased and waste was dehe did not recommend which plant should go down. He said he did not find out which plant until February 11th when he learned a recommendation to close the Hamilton plant was going to the Board of Directors. He stated that in meeting with the union in early March to discuss the plant closing he would have said that "had it not been for the strike the plant might have been closed last year". On cross-examination he testified that at the end of December the company still had "some hope of retaining some of the work". However, by January 6th the "figures were bad". By January 13th he knew that if the decline continued lay offs would be necessary and such a decision was made on January 17th. When asked to produce his daily production reports he testified that these reports are not retained.

22. Beettam testified that the budget for the Hamilton plant was approved in mid-November of 1982. He testified that the company's planning people establishing three to five year plans which are revised on an annual basis. He can make a decision to expend up to \$10,000 within his budget. Decisions requiring funds in excess of this up to \$50,000 require the approval of Mr. Haiplik. Decisions requiring the expenditure of funds in excess of \$100,000 are approved by the Board of Directors. He agreed that justification for these expenditures was typically well documented.

23. Mr. Ken Gills, Production Manager at the Hamilton plant, was a member of the company's negotiating team and testified he was not aware of any proposal to close the Hamilton plant during negotiations. He said he became aware of the decision to close February

11th, 1983 when he was so advised by Beettam and Gruber. He testified that "things were clearly deteriorating" in December of 1982 necessitating notices of lay off. The company was facing the likely end of the industry strike and Christmas is a traditionally slow period. Lay off notices were again given January 19th, 1983, the decision having been made to lay off January 17th, 1983. The witness testified that he was looking at backlog figures on a daily and weekly basis. He testified that the company did not tell the union things were returning to the way they were prior to the strike but, he supposed, the situation had not reached that point yet.

24. Mr. Gruber, at the time of negotiations, was Manager of Labour Relations for Consolidated-Bathurst Inc. He is now Vice-President, Human Resources for MacMillan-Bathurst Limited, the new company formed by the merger of the packaging operations of MacMillan Bloedel and Consolidated-Bathurst. He was advised by Ted Haiplik in mid or late November of 1982 that the company was desirous to conclude negotiations as quickly as possible. It was the thinking that if the respondent settled quickly it "might" maintain the competitive edge. The strike deadline was set by the union for January 8th and he testified that he did not have any knowledge that the Hamilton plant was to close. He said Mr. Haiplik told him on February 9th or 10th that there was going to be a recommendation to that effect made to the Board of Directors. It was explained to him that the short and long term situation was not good and that the orders had dropped off. On February 11th he met with Mr. Gills and Mr. Beettam. It was his recollection that at the March meeting Beettam advised the union committee that "the Hamilton plant likely had a reprieve" because of the strike and that he recalled saying that "if it had not been for the strike, the plant probably would have closed last year". He testified that he was aware of the *Westinghouse* decision rendered by this Board which obligates companies to reveal firm decisions. He also thought the company's statutory obligation to disclose would have been "a little firmer" by February 11th but by that time a collective agreement had been entered into. He testified that the union did not raise anything about plant closure during negotiations; indeed, no question was raised by the union with respect to lay offs. By late December the customers were jittery; the industry had settled; and Consolidated-Bathurst was faced with a strike deadline. The company was also experiencing a sagging market and December lay offs had been necessary. On cross-examination he admitted that the company did not get legal advice with respect to its disclosure responsibilities prior to negotiations. He also was not surprised it was the Hamilton plant selected because of its past record. He agreed that he advised the union that customers were impatient and that the company needed an agreement as soon as possible. He testified that industry settlements began a week or two before Christmas. He was not aware of the rationalization planning going on in 1982 in the company. He was also not aware of anything in writing about the closing of the Hamilton plant. He was not aware of any study conducted by Haiplik although he ventured the opinion that Mr. Al Ross, Director of Manufacturing for the company, may have been consulted. He testified that he contacted Denise Dellaire referred to in various newspaper reports. He gave her the severance cost, and capital investment figures would have come from accounting people. He never asked her where she got her information that a study had been underway for a number of months. While Mr. Gruber appears to have taken notes for all labour-management meetings up until March of 1983, he testified that no notes were taken for the March 1st and March 4th meetings with the trade union. He described the March 1st meeting as "not much of a meeting".

Argument

25. There are three branches to the complainant trade union's argument. It argues first that the respondent's conduct clearly violated the bargaining duty as set out in *Westinghouse Canada Ltd.*, [1980] O.L.R.B. Rep. April 577 in that the respondent knew it was going to close the Hamilton plant and failed to disclose this fact. Secondly, the complainant submits that even if a firm decision to close the Hamilton plant had not been made prior to executing the collective agreement, the respondent breached section 15 of the Act by failing to disclose a decision it was "seriously contemplating". Thirdly, and finally, it is submitted that the respondent had a duty to bargain with the complainant to impasse even after the execution of the collective agreement. With respect to its first argument, counsel emphasized that the person who effectively made the decision, Mr. Haiplik, was not called upon to testify. It was clear from Mr. Souccar's evidence that the company was considering rationalization due to overcapacity in the industry and the recession itself in April of 1982. At that time the Hamilton plant was on short hours and experiencing a large lay off. The respondent was also involved in merger discussions with MacMillan Bloedel Packaging as another response to the industry's overcapacity. Counsel emphasized that at the conclusion of the industry-wide strike all of the problems facing the company in April of 1982 had continued or returned. The problem of overcapacity was still there. The recession was continuing and there were a number of new adverse factors. The U.S. competition had managed to obtain long term commitments during the strike. Customers were running on inventory they had built up during the latter stages of the strike. Price levels had fallen to the 1981 level. By the end of December orders were being cancelled and merger discussions were recommenced in early January. The complainant submitted that some time in 1982 a decision had been made that one of the plants in Ontario would be closed and based on prior performance "it was crystal clear which plant it would be". However, the strike intervened and the company decided to take full advantage of the situation. When the pre-strike problems began to re-emerge, the company activated its earlier decision. Mr. Souccar had been subpoenaed before this Board by the complainant on a subpoena duces tecum and counsel submitted that this Board should not accept his assertion that the only documentation of the plant closure was the Board minute of February 1983. It was contended that all of the circumstantial evidence pointed to a much earlier decision. Counsel emphasized the statements made by Mr. Gills, Beettam and Gruber in March of 1983. Reference was also made to the public comments attributed to Denise Dellaire that the plant closing had been under study for a number of months and the press release of the company indicating the decision to close was inevitable. Counsel urged this Board not to put undue emphasis on the timing of the Board of Directors purported decision-making. It was submitted that the *de facto* decision was made by the operating management of Consolidated-Bathurst. In this respect counsel urged the Board to look at the realities of running a major corporation like Consolidated-Bathurst. For example, he pointed to the fact that its subsidiary Bathurst Packaging Limited was really only a holding company of various physical assets. Mr. Souccar was even unclear whether he was a member of the Board of Directors of Bathurst Packaging and it is clear that Bathurst Packaging has not had a Board of Directors' meeting to affirm the sale of its various assets. Rather, it was submitted, Consolidated-Bathurst is really the operating entity and made the effective decisions with respect to how the assets of Bathurst Packaging were to be deployed or utilized. Alternatively, counsel for the complainant submitted that given the dramatic impact on employees who are now locked into a collective agreement for a number of years, the onus was the respondent to prove precisely when the decision to close was made. The absence of compelling documentation ought to weigh against the Board finding this onus was met.

26. The complainant's second major alternative argument requested this Board to reconsider its holding in *Westinghouse* that an employer does not have to reveal on his own initiative plans which have not become at least *de facto* decisions. The complainant asserted that the test ought to be disclosure where an employer is "seriously considering an action which if carried out will have a serious impact on employees". The complainant asserted that an employer's obligation in such circumstances should be either to discuss and bargain the problem with the trade union or defer the signing of any collective agreement until the actual decision is made. Reference was made to two articles which have questioned the Board's requirement of firm decisions. See B. A. Langille, *Equal Partnership in Canadian Labour Law* 1983 (as yet unpublished); M. J. MacNeil, *Plant Closing and Workers' Rights* (1982), 14 *Ottawa L.Rev.* p.1 at p.24. In support of the "thinking seriously" test the Board was referred to *Ozark Trailers Inc. et al* (1967), CCH NLRB 26,871 and Notes, *Enforcing The NLRA: The Need for a Duty to Bargain Over Partial Plant Closings* (1982), 60 *Texas L.Rev.* 279 at p.307 et seq. Counsel emphasized that the absence of any authoritative analysis going to the corporate Board demonstrated that the real decision was made by the operating people of Consolidated-Bathurst and that the Board of directors, in effect, rubber stamped the earlier decision. The complainant contended that the *Westinghouse* approach created an incentive for employers not to make major decisions until a union was locked into an agreement and that it encouraged companies to act without written memoranda. Counsel argued that the bargaining duty was designed to achieve informed and rational discussions in order to maximize the joint decision-making provided by the collective bargaining process. Reliance was also placed upon the approach taken in *Sunnycrest Nursing Homes Ltd.* (1981), OLRB Rep. Feb. 261 where the Board stated it would be tantamount to a misrepresentation if a union were induced to enter an irrevocable agreement for a fixed term without being advised of matters which could fundamentally alter the content of that bargain.

27. In its third and final major submission the complainant urged this Board to find the existence of a statutory duty to bargain with a union over major and unexpected changes introduced or intended to be introduced during the term of a collective agreement. Counsel submitted that the *Labour Relations Act* balanced the employees' right to participate in decision-making with the employer's interest in economic stabilization in the form of a fixed and binding contract. Counsel pointed out that during the term of any collective agreement, all differences are required by statute to be resolved by grievance arbitration and yet a collective agreement may be silent on the matter of a major change. Instead of this silence enuring to the sole benefit of either management or labour, counsel for the complainant proposed that the parties should be obligated to consult and bargain with each other to impasse. If and when an impasse was arrived at, the employer would be free to act but, counsel suggested, the very process of consultation would be of value and supportive of the collective bargaining process. Counsel urged the Board not to analogize this problem to that of subcontracting during an agreement's term and pointed out that many of the subcontracting cases did not impact significantly on existing jobs. In any event, counsel urged that there exists "no climate of collective bargaining" in the area of plant closings. It was submitted that statutory authority for the ongoing duty to bargain could be found in sections 40, 41, 50, 64 and 77. It was submitted that the respondent has in effect unilaterally terminated the collective agreement and with it the bargaining rights of this particular local. As a party to the collective agreement the complainant trade union has a real interest in this matter and the failure of the respondent to bargain with it over the serious issues arising because of the decision to close, it was submitted, clearly violated section 64 by constituting "an interference with the formation, selection and administration of the trade union". It was submitted that section 15 was not

exhaustive of a collective bargaining relationship between employers and trade unions and that section 64 had a very similar function to section 15 during the term of any collective agreement with respect to major change the parties have not contemplated. It was further submitted that the existence of Article 18.26 should not be construed as a waiver of the mid-term duty to consult and bargain. The provision had been negotiated in the abstract and had not been changed in the most recent round of bargaining. For authority for this submission, the complainant relied upon *New York Mirror* (1965), CCH NLRB 9200; *Inglis Limited*, [1977] OLRB Rep. Mar. 128; *Kennedy Lodge*, [1980] OLRB Rep. Oct. 1454; *Sunnycrest Nursing Home*, [1981] OLRB Rep. Feb. 261; and *Pacific Press Ltd.*, 83 CLLC ¶16,024. Reference was also made to T. J. Heinsz, *The Partial-Closing Conundrum: The Duty of Employers and Unions to Bargain in Good Faith* (1981), 71 Duke L.J. 71.

28. On the issue of remedy, counsel submitted that there should be a back pay order running from the time at which the respondent should have commenced to bargain with the trade union over the closing until an impasse was actually arrived at or until an agreement was achieved. Counsel submitted that it must be presumed that the grievors would have retained their jobs at least until the respondent had fulfilled its bargaining obligation. The complainant requested, on this basis, that the terminated employees be made whole for any loss of pay they may have suffered as a result of the respondent's unfair labour practice. More specifically, the liability for such back pay should, it was contended, cease only upon the occurrence of any of the following conditions: (1) reaching mutual agreement with the union relating to the subjects which the respondent is required to bargain about; (2) bargaining to a bona fide impasse; (3) the failure of the union to commence negotiations within five days of the receipt of the respondent's notice of its desire to bargain with the union; or (4) the failure of the union to bargain thereafter in good faith. For this type of order, the complainant relied upon *Winn-Dixie Stores* 56 LRRM 1266; *National Family Opinion Inc.* 102 LRRM 1641; *Marriott Corp.* 111 LRRM 1354; *Brockway Motor Trucks* 104 LRRM 1514; and *Brooks-Scanlin* 102 LRRM 1607.

29. On behalf of the respondent company it was submitted that the extent of its bargaining duty was to disclose any decisions the company had made about the closing of the plant during the course of negotiations. Counsel submitted that on the evidence before the Board one could only conclude that a definitive decision had not been made and that the respondent was not obligated to engage in speculation about a possible plant closing during bargaining. Counsel emphasized that the complainant had asked for and obtained a no-board report and had set a strike deadline. Parties negotiated a collective agreement in the face of this deadline and the trade union asked no questions with respect to possible plant closing or any other matter which could pertain to the job security of the employees it represented. While there were rumors and speculation about a plant closing since 1978, the matter of plant rationalization had been put aside during the period of the industry-wide strike. During bargaining the complainant trade union initially proposed an amendment to Article 18.26 which eventually was dropped. Counsel to the respondent submitted that Article 18.26 dealt entirely with the argument of any mid-contract duty to bargain and that in any event, the parties met at the time of closing, and held discussions with respect to the closing. It was submitted that the company was not obligated to sit down with the trade union and political personalities without an agenda and with the press in attendance. Counsel submitted that there was no obligation on the respondent company to call Mr. Haiplik because it was Mr. Souccar who ultimately made the recommendation to Mr. Stangeland and Mr. Souccar did present himself as a witness and testified. Counsel urged this Board to find that from November 2nd until

January 13th the respondent was not considering the closing of the Hamilton plant in that it was still running that facility at capacity. Under these circumstances, there was no need to consider a closing. Counsel contended that the respondent company needed to know how its own customers were going to respond and what was going to happen in the market place in general. Neither of these factors could be properly assessed until the respondent had a collective agreement with the complainant. With respect to the respondent company's obligation to call Mr. Haiplik, the Board was referred to Sopinka and Lederman, *The Law of Evidence*, Chapter 7, pgs. 536-7. Counsel contended that no prima facie case had been made out by the complainant or, in the alternative, Mr. Souccar's evidence was sufficient in the circumstances. Counsel suggested that it would have been easy for the company to engineer a strike on the issue of the plant closing and then to close the plant during bargaining thereby eliminating the need to pay severance pay either under the collective agreement or the *Employment Standards Act* (see section 40A of the *Employment Standards Act*). Counsel argued that the respondent company was entitled to wait and assess the reaction of its customers after a collective agreement had been negotiated. In his view, the industry-wide strike had been a long one and the respondent could reasonably have anticipated greater gratitude from its customers than it actually received. In this respect reliance was placed on *Amoco Fabrics*, [1982] OLRB Rep. Mar. 314. It was submitted that the respondent company simply did not expect the bottom to fall out of the market in the way that it did. Had the matter been raised during bargaining, counsel contended, that the respondent would not have been believed or the information would have been perceived as a threat thereby attracting an unfair labour practice charge.

30. It was further contended on behalf of the respondent company that by the management right's clause of the collective agreement the parties had conceded the responsibility to management to make decisions on such matters as plant closings subject, of course, to Article 18.26. Reference was also made to section 77 of the *Labour Relations Act* providing that nothing in the Act prohibits an employer from suspending or discontinuing its activities for cause. Counsel argued that there was clearly cause in the circumstances before the Board. On the issue of remedy, counsel for the company argued that at the very least no remedy could run until the complaint was actually brought forward. Counsel also referred to the newspaper article wherein Mr. Lapata admitted that the complainant did not believe the respondent had bargained in bad faith and that the complaint was filed just to receive more money.

Decision

31. One of the most difficult problems faced by collective bargaining is the impact of changing economic, technological and social conditions. How ought it to deal with the necessary management initiatives occasioned by these changes? Where change occurs while parties are bargaining a collective agreement, there is usually ample opportunity for them to review the need for the decision involving change and the impact of that decision. Where change arises during the term of a collective agreement and the agreement does not deal explicitly with that change, different considerations arise. In the facts at hand, for example, the respondent takes the position that the change (i.e. an eroding market) occurred after the collective agreement was negotiated and that management had a unilateral right, therefore, to close the plant without any further dealings with the complainant trade union. Counsel points to the management rights clause; to Article 18.26 dealing specifically with a plant closure; and to the arbitral jurisprudence which generally consigns to management the right and responsibility to initiate change subject to the explicit provisions of a collective agreement providing otherwise. In cases of this kind there are, of course, significant conflicting values at

stake. There is the desirability of stability in collective bargaining relationships as evidenced by the statutory policy requiring a collective agreement for a minimum term of one year and the twin statutory requirements of "no strike and no lockout". All differences during the term of an agreement are to be funnelled through grievance arbitration. It is also widely understood that management must have the ability to take initiatives in responding to the new demands posed by changing circumstances. The market place seldom awaits labour and management consensus. On the other hand, unilateral management initiatives can adversely affect significant interests of employees and unions who, in the absence of change, may have built up certain expectations and attitudes concerning the status quo. The plight of the middle aged and older worker suddenly without a job is very real for that person and his immediate family. See Adams, *Bell Canada and the Older Worker: Who Will Review the Judges?* (1974), 12 Osgoode Hall L.J. 389. The impact of the related unemployment on the community and its resources also poses significant social and economic problems not confined to the parties. Unfortunately, it is not possible to foresee in advance all the labour relations problems inherent in changing industrial conditions. It is also not possible nor, arguably, desirable "to delay agreement in order to pin down, by specific language, the contractual consequences of change foreseen from afar and only in the abstract". See Weiler, *Labour Arbitration and Industrial Change* (1969), p.2.

32. The arbitral jurisprudence is replete with examples of a similar tension in values over the issue of subcontracting. A review of the literature and the cases also points out major philosophic differences which arose out of the industrial relations system's efforts to sort out the rights of the parties where the contract was, for all useful purposes, silent. And, like many policy initiatives made in the context of a conflict between major and compelling values, public policy was and continues to be incremental, fragmented and ambivalent. Nor has it been very explicit. Without going into a detailed review of the evolutionary response of arbitrators, passing reference can be made to the early debate between those who saw the collective agreement as essentially taking away or limiting the pre-existing right of management to institute change and those who saw a collective bargaining relationship as a new point of departure wherein neither party came to the bargaining table with pre-existing rights. The "reserved or residual rights" school of thought saw management beginning with certain functions and prerogatives that pre-existed collective bargaining. From this perspective, the purpose of a union bargaining was to obtain contractual limitations on these rights. The "status quo" school of thought, on the other hand, argued that the parties began negotiating as equals. Each was permitted to enjoy those explicit rights conferred by the collective agreement on one side or the other. To the extent there was no explicit mention in a contract about a certain matter, then the status quo at the beginning of the agreement modified by practices that had been accepted during the administration of the agreement should be the criterion for evaluating the legality of proposed employer action. A variation on this theme was known as "the implied obligation" philosophy wherein it was thought that arbitrators should develop a new common law of the collective agreement when the agreement was silent. An arbitrator's conclusions would be based on "such implications as were necessary to give practical or business efficacy to the collective agreement". See *Peterboro Lock* (1953), 4 L.A.C. 1499. Whatever the intrinsic merits of these various approaches, over the last 30 years both arbitral and judicial doctrine in Ontario have come to accept, with some reservations, the residual rights theory as justifying a management prerogative to change, unilaterally, working conditions for business reasons during the term of a collective agreement unless the agreement provides otherwise. See *Russelsteel Ltd.* (1967), 17 L.A.C. 253 (Arthurs); *Kennedy Lodge Nursing Home* (1981), 28 L.A.C. (2d) 388 (Brunner); Weiler, *Labour Arbitration and Industrial Change*, *supra*, page

6. The limited, although significant, reservations relate to a growing body of arbitral jurisprudence dealing with implied standards of conduct when management exercises such a unilateral right. See *Metro Police* (1981), 33 O.R. (2d) 476; *Council of Printing Industries Ont.* C.A. June 15, 1983 as yet unreported; and *Re CN/CP Telecommunications*, (1982) 4 L.A.C.(3d) 205 (Beatty).

33. Understanding the approach of arbitrators to industrial change where an agreement is silent is a necessary prelude to appreciating another and important legal perspective on change – the bargaining duty. This statutory duty of an employer is to bargain with a certified trade union “respecting terms or conditions of employment or the rights, privileges or duties of the employer....” In the United States this duty continues even after the execution of a collective agreement to the extent that the agreement is silent on the management initiative in question. This is not the case in Ontario where the duty is described in much more temporal and specific terms. For example, section 8(d) of the *National Labour Relations Act* is very general in nature as to when it applies and provides:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, such obligation does not compel either party to agree to a proposal or require the making of a concession....

34. In Ontario the *Labour Relations Act* provides:

14. *Following certification*, the trade union shall give the employer written notice of its desire to bargain with a view to making a collective agreement.

15. The parties shall meet within fifteen days from *the giving of the notice* or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort *to make a collective agreement*.

16.-(1) *Where notice has been given under section 14 or 53*, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

(2) Notwithstanding the failure of a trade union to give written notice under section 14 or the failure of either party to give written notice under sections 53 and 122, where the parties have met and bargained, the Minister, upon the request of either party, may appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

(3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the em-

ployees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister may, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour *to effect a collective agreement*.

(4) Notwithstanding anything in this Act, where the Minister has appointed a conciliation officer or a mediator and the parties have failed to enter into a collective agreement within fifteen months from the date of such appointment, the Minister may, upon the joint request of the parties, again appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement, and, upon such appointment being made, sections 17 to 34 and 72 to 79 apply, but such appointment is not a bar to an application for certification or for a declaration that the trade union no longer represents the employees in the bargaining unit.

18.-(1) Where a conciliation officer is appointed, he shall confer with the parties and endeavour to effect a collective agreement and he shall, within fourteen days from his appointment, report the result of his endeavour to the Minister.

(2) The period mentioned in subsection (1) may be extended by agreement of the parties or by the Minister upon the advice of the conciliation officer that a collective agreement may be made within a reasonable time if the period is extended.

(3) Where the conciliation officer reports to the Minister that the differences between the parties concerning the terms of a collective agreement have been settled, the Minister shall forthwith by notice in writing inform the parties of the report.

53.-(1) Either party to a collective agreement may, *within the period of ninety days before the agreement ceases to operate*, give notice in writing to the other party of its desire to bargain with a view to the renewal with or without modifications, of the agreement then in operation or to the making of a new agreement.

(2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection (1).

(3) Where notice is given by or to an employers' organization that has a collective agreement with a trade union or council of trade unions, it shall be deemed to be a notice given by or to each member of the employers' organization who is bound by the agreement or who has ceased to be a member of the employers' organization but has not notified the trade union or council of trade unions in writing that he has ceased to be a member.

(4) Where notice is given by or to a council of trade unions, other than a certified council of trade unions, that has a collective agreement with an employer or employers' organization, it shall be deemed to be a notice given by or to each member or affiliate of the council of trade unions that is bound by the agreement or that has ceased to be a member or affiliate of the council of trade unions but has not notified the employer or employers' organization in writing that it has ceased to be a member or affiliate.

54. Sections 15 to 34 apply to the bargaining that follows the giving of a notice under section 53.

[emphasis added]

35. The only section explicitly dealing with mid-contract dispute resolution is section 36 which provides:

36.-(1) Where, at any time during the operation of a collective agreement, the Minister considers that it will promote more harmonious industrial relations between the parties, he may appoint a special officer to confer with the parties and assist them in an examination and discussion of their current relationship or the resolution of anticipated bargaining problems.

(2) A special officer appointed under subsection (1) shall confer with the parties and shall report to the Minister within thirty days of his appointment and upon the filing of his report his appointment shall terminate unless it is extended by the Minister.

(3) Any person knowledgeable in industrial relations may be appointed a special officer, whether or not he is an employee of the Crown.

[emphasis added]

36. Against the backdrop of these provisions, it would be stretching legislative language and intent to the point of breaking for this Board to infer along American lines a full blown continuing duty "to bargain in good faith and make every reasonable effort to make a collective agreement". The complainant has submitted that such a duty lurks beneath the surface of the language found in section 64 but reading the Act as a whole we cannot agree. Nor have other panels of the Board accepted this proposition. See *Westinghouse Canada Ltd.*, [1980] OLRB Rep. Apr. 577; *Sunnycrest Nursing Homes Ltd.*, [1981] OLRB Rep. Feb. 261. However, this is not to say that an employer can refuse to meet with a certified bargaining agent where change has been introduced, particularly where the change and its impact were not contemplated by the parties on entering into the agreement. Not to meet and discuss a matter of such fundamental importance would constitute a rejection of a trade union's statutory status and amount to an interference with the formation, selection or administration of a trade union contrary to section 64. This duty to consult and deal with a certified bargaining agent on an ongoing basis, however, is many shades lighter in content than the bargaining duty and does not require an elaboration in this case. In the facts at hand, it is sufficient to note that the respondent employer met with the trade union concerning the closure on a number of occasions in March. In our view, it was not obligated by the *Labour Relations Act* to meet with

the trade union and interested politicians in a public setting. This novel leg of the complainant's argument is therefore of no avail.

37. It therefore remains for us to analyze the more fundamental statutory duty to meet and bargain in "good faith" in an effort to achieve a collective agreement and "to make every reasonable effort to make a collective agreement". Because an employer has the benefit of the arbitral jurisprudence described above once a collective agreement is executed, the bargaining duty's contribution to the regulation of industrial change, arguably, takes on added meaning. This case is about the shape of that duty in the context of a plant closing announced approximately six weeks after the signing of the collective agreement.

38. Clearly, collective bargaining is an appropriate tool for dealing with the impact of industrial change in a work environment although it is by no means a complete answer to the difficulties thrown up for both labour and management. It enables solutions to be tailored to the needs of the individual participants; trade-offs can be made; and, at the very least, there is the sense of participation in the eventual outcome. Of course, the difficulty with the legal background in Ontario is that the requirement of compulsory no strike clauses together with the absence of a continuing duty to bargain during the term of the agreement, minimizes the likelihood that parties will engage in collective bargaining about these issues. Indeed, it has been pointed out that against the backdrop of the arbitral and collective bargaining framework discussed to this point, there is a real incentive for employers not to make decisions with respect to major change until a union is locked into a collective agreement. See Weiler, *supra*; Langille, *supra*; and MacNeil, *supra*; pp.19-25. Other jurisdictions such as British Columbia, Manitoba, Saskatchewan and the Federal Government have enacted specific provisions to permit bargaining over various types of mid-contract change. See *Saskatchewan Trade Union Act* s.43 (R.S.S. 1978 c.T-17); *Manitoba Labour Relations Act* ss.72-75 (R.S.M. 1972 c.75); *British Columbia Labour Code* ss.74-78 (R.S.B.C. 1979 c.212); *Canada Labour Code* ss. 149-153 (R.S.C. 1970 c.L-1 as amended by S.C. 1972 c.18 s.1). For example, section 43(1) of the Saskatchewan's *Trade Union Act* uses a very broad definition of technological change, defining the term to include "the removal by an employer of any part of his work, undertaking or business". An employer proposing to implement such change affecting terms, conditions or tenure of a significant number of employees is required by section 43(2) of the Act to give at least 90 days' notice to the trade union before implementing such change. The union, under section 43(8) is then entitled to serve a demand on the employer to bargain to revise the collective agreement concerning terms, conditions or tenure or to include new provisions relating to such matters to assist the employees affected by the technological change to adjust to the effects. Section 43(9) exempts the employer from the duty to bargain where he has given notice of proposed changes before the collective agreement was signed or where the collective agreement contains provisions by which these issues can be negotiated and finally settled during the term of the agreement. Otherwise, section 43(10) denies the introduction of change until an agreement is reached or an impasse has been reached and the Minister of Labour given notice. What is promoted by this type of legislation is "a continuing duty to bargain" along the lines that until recently existed in the United States although the emphasis appears to be on "impact bargaining" as opposed to "decision bargaining".

39. We have reviewed this background in some detail to set out the complexity of the problem before us and the historical underpinnings of current policies. In considering the application of the bargaining duty in this context the Board needs to be sensitive to the limited time span of the duty and the potential for unilateral employer action once the duty ends and

a collective agreement is signed. The incentive for non-disclosure or manipulation of decision-making should also be kept in mind when assessing evidence and an employer's stated justification. On the other hand, this Board must be sensitive to the limits of adjudicating policy responses to the general problem of industrial change. The history and complexity of the problem together with the competing values at stake has attracted legislated solutions in other jurisdictions after considerable debate and reflection. An isolated fact situation arising in the context of an unfair labour practice complaint is not a comparable format for fashioning a meaningful policy contribution. The Board must also be sensitive to the statutory purpose of the bargaining duty, the language describing that duty, and the industrial relations implications of one approach over another. A single-minded pursuit of disclosure is inconsistent with the scheme of the Act and sound collective bargaining practices. The same can be said of the opposite direction. The experience before the NLRB does little to dispel this caution.

40. In the United States there has been considerable labour board experience in this area which is worthy of a brief review. In fact, a recent decision of the United States Supreme Court has dramatically changed the reach of the continuing duty to bargain in the United States in the very context of plant closures. In that jurisdiction an employer is forbidden from making unilateral changes in the terms and conditions of employment of his employees who are represented by a union with which he is under a duty to bargain. Such action raises a rebuttable presumption of a failure to bargain in good faith. See Schatzki, "The Employer's Unilateral Act" (1965-66), 44 Texas L.Rev. 470 and Note, "Unilateral Action as a Legitimate Economic Weapon" (1962), 37 N.Y.U.L. Rev. 666. However, in giving meaning to the phrase "terms and conditions of employment" contained in section 8(d) of the *National Labor Relations Act* it has been held that there are certain management decisions which fall outside the ambit of this phrase and that therefore are subject only to permissive bargaining and thus, unilateral employer control. These "non-mandatory" issues are said to be subject to the final decision of management and centre on core managerial responsibilities such as "type of product, financing, etc.". But in *Fibreboard v. NLRB* (1964), 379 U.S. 203 the United States Supreme Court decided that at least some subcontracting decisions could be construed to come within the phrase "conditions of employment". In effect, it was held that some managerial decisions, even when taken for purely economic reasons, are to be subject to bargaining when there is an effect on employment or job security. However, the Court noted that management decisions in this area extend along a continuum from choice of product to price policies, to location of plants, to choice of production processes, etc. The suggestion was that with respect to many of these matters an employer would have a decisive interest in exclusive and flexible discretion. Mr. Justice Stewart suggested:

An enterprise may decide to invest in labour saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control.... This kind of subcontracting falls short of such larger entrepreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be. In my view, the courts decision in this case has nothing to do with whether any aspects of those larger issues could under any circumstances be considered subjects of compulsory collective bargaining under the present law.

Subsequently, the Court approved that an employer could not be penalized for going totally out of business for any reason. See *Textile Workers Union v. Darlington Manufacturing Co.* (1965), 380 U.S. 263. Nevertheless, the NLRB adopted an expansive interpretation of *Fibreboard* with respect to partial plant closings holding a duty to bargain on employers existed whenever a management decision had an impact on employment conditions. This per se rule achieved its fullest expression in *Ozark Trailers Inc.* (1966), 161 NLRB 561 in which the Board required a manufacturer of refrigerated truck bodies to bargain before deciding to close one of its plants. In this respect the Board wrote:

...We do not believe that the question whether a particular management decision must be bargained about should turn on whether the decision involves the commitment of investment capital, or on whether it may be characterized as involving "major" or "basic" change in the nature of the employer's business...

Initially, congress made the basic policy determination, in enacting the *National Labor Relations Act*, that, despite management's interest in absolute freedom to run the business as it sees fit, the interests of employees are of sufficient importance that their representatives ought be consulted in matters affecting them, and that the public interest, which includes the interest of both employers and employees, is best served by subjecting problems between labour and management to the mediating influence of collective bargaining....

Accordingly, we think it no significant intrusion on management freedom to run the business to require that an employer – once he has reached the point of thinking seriously about taking such an extraordinary step as relocating or terminating a portion of the business – discuss that step with the bargaining representative of the employees who will be affected by his decision....

However, in *First National Maintenance Corp. v. NLRB* (1981), 452 U.S. 666 the United States Supreme Court returned to the caveat of Mr. Justice Stewart in *Fibreboard*, *supra*, and reversed this gradual evolution of doctrine by putting partial closings and other decisions involving the termination of a bargaining unit beyond the reach of the duty to bargain. It held that while section 8(d) left the Board with power to define "terms and conditions of employment", the Board's discretion was not unlimited. Management decisions only indirectly affecting the employment relation were to remain unregulated, while decisions "almost exclusively" part of the work relation fell within the Board's authority. A difficult and third problem area, in the Court's view, was where decisions directly affected employment but "had as their focus only...economic profitability" like the economically motivated partial closing decision. It held that in this third area bargaining was to be ordered "only if the benefit, for labour-management relations and the collective bargaining process, outweighed the burden placed on the conduct of business". In engaging in this calculus, the Court defined the union's interest as the "largely uniform" goal of seeking "to delay or halt the closing". The majority feared that bargaining "could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose". After then listing the management need for speed, flexibility and secrecy in meeting business opportunities the Court concluded that:

The harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision and we hold that the decision itself is not part of section 8(d)'s "terms and conditions"...over which Congress has mandated bargaining.

41. Canadian labour law has not followed the "mandatory/permissive" distinction. Labour boards have not construed terms and conditions of employment in a narrow manner but rather have seen a collective agreement as a constitutional document embodying such terms as the parties wish to insert. The reasons for rejecting a field of employer interest which cannot be encroached upon by collective bargaining are clear. A system of unilateral imposition of terms and conditions of employment is more associated with the law of master and servant. Collective bargaining arose in response to that regime. A limited scope for bargaining is also inconsistent with the view of collective bargaining as a vehicle by which some participation to employees in formulating their own destiny is assured. With few limitations, terms and conditions of employment are what labour and management agree to include within a collective agreement. See *Pulp and Paper Industrial Relations Bureau*, [1978] 1 Can. LRB 60 (BC LRB).

42. On the other hand, as we have seen, this rationale competes in Canada with industrial stability and contractualism once a collective agreement is executed. We have seen that collective bargaining in Canada has significant temporal as opposed to substantive limitations. These temporal limitations become important in considering and assessing the disclosure requirements Canadian labour boards, such as this one, have begun to fashion through the bargaining duty.

43. Forced disclosure is not a self-evident principle in the context of bargaining. In contractual negotiations at common law, one quickly becomes familiar with the notion of *caveat emptor*. In fact, good negotiators are analogized to good "card players" and, in the playing of cards, it is essential that players *not* be aware of the cards dealt to other participants. But collective bargaining is a matter of statutory policy and is aimed at achieving industrial peace. Therefore, it is *not* a game and involves ongoing economic relationships vital to the well-being of our economy. It is a process in which labour, management and the public have a vital interest. This is why the *Labour Relations Act* requires the parties to "bargain in good faith and make every reasonable effort to make a collective agreement". Disclosure arises out of this phrase in two quite different ways and based upon two quite different purposes of the bargaining duty. In *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49 the Board pointed out that the duty reinforced an employer's obligation to recognize a bargaining agent (the "good faith" component) but stated that beyond this important purpose it was also "intended to foster rational, informed discussion..." (the "reasonable effort" aspect). While *DeVilbiss* dealt with both aspects of the duty in considering the refusal of the employer to provide the union with existing wage rate and classification data about the bargaining unit in a first agreement bargaining context, the Board emphasized the rational and informed discussion perspective in ordering disclosure. The trade union had *asked* for the information; the employer refused; and, on complaint, the Board required that the information requested be disclosed. In so deciding the Board stated:

...Of additional concern is the respondent's failure to respond to the complainant's request at this first meeting for existing wage and classification information. Particularly in "first agreement" situations, it is little wonder that a complainant would have an incomplete monetary demand until it fully appreciated the current rate of wages paid by a respondent and the detailed nature of its job structure. Rational and informed discussion cannot easily take place until and assessing the disclosure requirements Canadian labour boards, such as this one, have begun to fashion through the ction. As a general matter of policy, if parties are to engage in economic conflict their differences ought to be real and well-defined. It is patently silly to have a trade union "in the dark" with respect to the fairness of an employer's offer because it has insufficient information to appreciate fully the offer's significance to those in the bargaining unit. Moreover, a trade union has a duty to all of the employees in the bargaining unit and thus has to be concerned, in a large measure, with equality of treatment. (For the American experience in this area see *J. H. Allison & Co.* (1946) 70 NLRB 377; *Whitin Machine Works* (1954), 217 F. 2d 593 (4th Cir.); *Aluminum Ore Co.* (1942), 131 F. 2d 485 (7th Cir.); *Yanman & Erbe Manufacturing Co.* (1951) 181 F. 2d 947 (2nd Cir.); *Truitt Manufacturing Co.* (1954) 110 NLRB 856; and see generally Bortosic and Hartley, *supra*.)

A bargaining agent can claim entitlement to information necessary for it to reach informed decisions and thereby to perform effectively its statutory responsibilities. Disclosure encourages the parties to focus on the real positions of both the employees and the employer. And hopefully with greater sharing of information will come greater understanding and less industrial conflict. Although Canadian experience is limited, the American cases reveal that the employer is under no duty, as a general matter, to provide information until the union makes a specific request for the relevant information. See J. T. O'Reilly and G. P. Simon, *Unions' Rights to Company Information*, Labor Relations and Public Policy Series No. 21, The Wharton School, Industrial Research Unit (1980) at p.11 and Bartosic and Hartley, *The Employer's Duty to Supply Information to the Union*, [1972-73] 58 Cornell L. Rev. 23. A request identifies a union's interest in specific information and then permits a discussion by the parties on the relevance of the data. The requirement of a request also sharpens a disclosure obligation. Without a request, an employer will be unclear what is needed and why. Indeed, a request is a basic method for receiving information particularly in an adversarial context. A general duty of unsolicited disclosure would be costly, unclear and potentially counter-productive. However, a second and more limited way the bargaining duty requires disclosure arises out of its good faith purpose and does not require a specific request. This approach was developed by the Board in two decisions rendered in *Inglis Limited*, [1977] OLRB Rep. Mar. 128 and *Westinghouse Canada Ltd.*, [1980] OLRB Rep. April 577. In *Inglis Limited*, *supra*, the Board was asked to find that the employer's failure to reveal plans to relocate a part of its business when asked in bargaining constituted a breach of the duty to bargain in good faith. In effect, it was alleged the respondent company had committed a fundamental misrepresentation on which the trade union had relied to its detriment. In applying the bargaining duty to this allegation the Board stated:

It is self-evident however, that misrepresentation, which is the antithesis of good faith, destroys the rational basis upon which informed collective

bargaining decisions are made. These decisions which are in respect of compensation, job security and the other terms and conditions of employment must follow from full and honest discussion. Misrepresentation is alien to this process and is contrary to the duty set out in section 14 of the Act.

44. One does not have to expand this principle significantly to conclude further that it is "tantamount to a misrepresentation" for an employer not to reveal during bargaining a decision it has already made which will have a significant impact on terms and conditions of employment such as a plant closing and which the union could not have anticipated. Indeed, this is what the Board held in *Westinghouse Canada Limited* in stating:

Similarly can there be any doubt that an employer is under a section 14 obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.

45. A difficult issue raised again in this case is whether this should be the extent of a duty to disclose without a specific request from the trade union. In *Westinghouse Canada Limited*, [1980] OLRB Rep. April 477, which was the first decision by the Board to suggest that disclosure of certain matters was obligatory without a request, the Board considered a standard of unsolicited disclosure beyond that of disclosing firm decisions having a fundamental impact on employees in the following passage:

On one side the Board must be concerned with potential distortion of the bargaining process by the imposition of an obligation which requires the employer to advise the union on his own initiative of plans which may never become decisions. On the other side, however, the Board must be sensitive to the purpose of the collective bargaining process and to the role of the trade union as exclusive bargaining representative of the employees who might be affected if these plans resulted in decisions being made by the company.

The competitive nature of our economy and the ongoing requirement of competent management to be responsive to the forces at play in the marketplace result in ongoing management consideration of a spectrum of initiatives which may impact on the bargaining unit. More often than not, however, these considerations do not manifest themselves in hard decisions. For one reason or another, plans are often discarded in the conceptual stage or are late abandoned because of changing environmental factors. The company's initiation of an open-ended discussion of such imprecise matters at the bargaining table could have serious industrial relations consequences. The employer would be required to decide in

every bargaining situation at which point in his planning process he must make an announcement to the trade union in order to comply with section 14. Because the announcement would be employer initiated and because plans are often not transformed into decisions, the possibility of the union viewing the employer's announcement as a threat (with attendant litigation) would be created. If not seen as a threat the possibility of employee overreaction to a company initiated announcement would exist. A company initiated announcement, as distinct from a company response to a union inquiry may carry with it an unjustified perception of certainty. The collective bargaining process thrusts the parties into a delicate and often difficult interface. Given the requirement upon the company to respond honestly at the bargaining table to union inquiries with respect to company plans which may have a significant impact on the bargaining unit, the effect of requiring the employer to initiate discussion on matters which are not yet decided within his organization would be of marginal benefit to the trade union and could serve to distort the bargaining process and create the potential for additional litigation between the parties. The section 14 duty, therefore, does not require an employer to reveal on his own initiative plans which have not become at least de facto decisions.

In that case the collective agreement was concluded September 15, 1978; operating management proposed a relocation plan as early as July 21, 1978; but an appropriations request for eleven million dollars was not prepared until October 27, 1978 and not approved by senior management until November 15, 1978. The parent board of directors approved on November 29, 1978 and on December 12, 1978 so did the board of the Canadian subsidiary. In applying the above statement of principle to these facts the Board arrived at this conclusion:

The signed memorandum of agreement between the parties dated September 12, 1978 was ratified on September 15th and constituted a collective agreement within the meaning of section 1(1) of the Act as of that date. (See *Graphic Centre* [1976] OLRB Rep. May 221.) The funds necessary to implement the plan to decentralize were not approved until November 15, 1978 at the earliest. The Major Product Review Committee of the parent company gave approval to the \$11 million appropriation on that date. The matter went on to the parent company's Board of Directors about two weeks later. In our view a decision requiring the investment of approximately \$11 million of capital is not a viable decision until those responsible for allocating the necessary funds have considered the arguments for and against and have decided one way or the other. In this case the necessary funds were not approved until the middle of November; some two months following the completion of bargaining. Although the timing is convenient from the company's point of view, there is no evidence to support the conclusion that the company manipulated the timing of its presentation to the parent. Indeed Mr. Tyaack in his letter of June 15, 1979 to Mr. MacNeil speaks of a compressed evaluation and decision time because of the strike. The inference to be drawn is that Mr. MacNeil should proceed with haste. There is no evidence to suggest that the company manipulated an end to the strike so as it could go forward

with its plans to decentralize during a period when the union could not bargain in response. No evidence directed at the particular nature of the bargaining moves which led to the September 12th memorandum of settlement was introduced. In the result we have come to the conclusion on the balance of probabilities that the company had not made a hard decision to relocate during the course of bargaining as would have required it to reveal its decision to the trade union.

The complainant trade union, which represented the company's Hamilton employees since 1945, has seen the company move parts of its operation from Hamilton on a number of occasions. Indeed, the evidence establishes that the union has responded to the relocation of work by unsuccessfully attempting to negotiate an expanded recognition on two occasions. While the company has negotiated with the union concerning the employee-related effects of some of its relocation decisions in the past, it has not done so on all occasions and this union may be seen to have recognized that future bona fide dislocations were a distinct possibility and that if they occurred the employees would not be protected other than for the exercise of city-wide seniority. The decision announced by the company in 1975 and rescinded shortly thereafter, to move the Switchgear and Control Division from Aberdeen Avenue to Burlington, underscores the extent to which this union should have been sensitive to the possibility of relocation. The trade union, however, failed to raise the matter and did not propose altering article 3.01(b) of the expired agreement which gives the company the unilateral right to determine the number and location of its plants. In these circumstances the union's position may properly have been seen by the employer as an acknowledgment of the status quo vis-a-vis the employer's right to locate its plants. The company had not reached a decision to relocate during bargaining as would have required it to reveal the content of that decision to the trade union. The union, although aware of the past history of this company with respect to relocations from Hamilton, chose not to inquire of the company whether it was planning any major reorganization as would have required the company to reveal the extent of its planning. We find, therefore, that the conduct of the company during bargaining did not violate the section 14 duty. The allegations as they relate to a breach of section 14 of the Act are hereby dismissed.

The Board, therefore, was very reluctant to expand the scope of unsolicited disclosure given the difficulty of defining the duty and the potential for unproductive impact at the bargaining table of plans or incomplete decisions.

46. More was said on this area in *Amoco Fabrics Ltd.*, *supra*. A collective agreement in that case was concluded in September of 1980 at Hawkesbury. However, during negotiations the company opened another plant elsewhere and subsequently rationalized its production. By November of 1980, the economic downturn required substantial indefinite lay-offs although the existence of the new facility removed whatever economic cushion the Hawkesbury facility might have had. It held that the company did not fail to disclose material information to the union. See also *Sunnycrest Nursing Home*, *supra*, where it was held that the

employer should have revealed a decision taken during bargaining and where the Board directed that decision to be reversed.

47. Against the backdrop of these cases some further reflection is merited. Corporate planning, it is argued, is necessarily complex and dynamic while collective bargaining is an adversarial and tactical process. Typically, unions bargain out provisions on the basis of a work force's experience. For example, as technological change becomes apparent, provisions are sought to cushion the effect. Day to day layoffs are expected and general seniority, recall and severance provisions are negotiated. It is also argued that the parties usually have enough real roadblocks to reaching an agreement without taking to impasse issues which "may" need a collective bargaining response. This may explain why in the *Westinghouse*, *Sunnycrest* and *Amoco* cases questions about possible management changes in the future were not asked by the unions themselves. Indeed, no request for information was made in the facts at hand. Another disincentive to revealing other than firm decisions without solicitation, it is pointed out, is the uncertainty over when the disclosure obligation arises. At what stage in an employer's thinking about major change is he obligated to reveal "this thinking" to the trade union? Is a recommendation from a corporate planning division sufficient grounds? What if those with the ultimate say have not seen the proposal or have deferred its consideration? What if the planning document contains sensitive information which, on disclosure to the union, might be learned by competitors, customers or suppliers? Premature disclosure may force an adverse decision to be taken that might have been avoided if events had been left to take their course. Corporate thinking about possible closings or relocations may also not be in direct response to labour related costs but rather potential loss of customers, need for expansion or a more advantageous market location. Until a decision is made, is the matter sufficiently ripe for collective bargaining discussions? Another problem relates to the potential severity of labour board remedies. For example the NLRB's usual backpay order from the date when disclosure should have been made until an actual impasse is arrived at under a Board bargaining order frequently puts employees in a better position than if the company had met its bargaining obligations, particularly if the plant would have closed anyway. In fact, with this type of order, a trade union might be encouraged not to ask questions about future planning and simply rely on the subsequent assistance of a labour board remedy. It could be reasonably suggested that these types of problems may have contributed to the United States Supreme Court eventually taking plant closure decisions off the bargaining table altogether. What policy justification then supports greater unsolicited disclosure and merits the Board's intervention in the face of these potential difficulties?

48. Those who argue for unsolicited disclosure beyond firm decisions marshal their arguments along the following lines. They point out that collective bargaining is valuable because of the "say" it gives employees in the decisions which affect them. When an employer fails to disclose changes which are being contemplated, employees are not put on notice of problems which may arise during the term of the agreement. The trade union will, in the usual case, enter into a collective agreement silent on the point which has the effect of providing for unilateral employer initiatives. Secondly, they point out unsolicited disclosure based only on firm decisions is a standard too subject to manipulation. Planning, proposals and decisions can be easily arranged around collective bargaining schedules particularly with the legal onus of proof in an unfair labour practice case involving section 15 residing with the complainant trade union. In response to claimed inherent uncertainty of proposals or plans, they submit that many decisions should not be made without first getting the trade union's response. They argue that in the face of cost-related problems, employees have frequently

played a pivotal role in keeping a business functioning or a plant open. They further submit that if such plans are sufficiently concrete to be disclosed when an employer is asked about his intentions by a trade union, as the *Westinghouse* case suggested, then why is it a factor in the context of disclosure without being asked? In any event, it is submitted that an employee's commitment to a company usually involves years of training, the development of specialized skills and the ordering of his entire life around the employer's business. A decision to shut a plant destroys these human investments in as real a manner as shareholders are affected. It is submitted that some disruption at the bargaining table is a small price to pay for trying to provide workers with a meaningful opportunity to participate in such a fundamental decision. They further point to the fact that from 1966 until just recently the United States labour relations system operated under the *Ozark Trailers Inc.*, *supra* standard of disclosure which required disclosure once management had "reached the point of thinking seriously about taking such an extraordinary step as relocating or terminating a portion of the business...." It is also pointed out that disclosure of only firm decisions is not likely to set the stage for productive "decision" bargaining. While bargaining does not demand that management ignore its own interests, bargaining is likely to be less productive if management already has its mind made up. It is further emphasized that the bargaining duty only imposes a duty on management to meet and discuss matters with a union. After that, it is free to do as it wishes. Finally, it is submitted that the very unusual and unexpected nature of major business decisions affecting employees explains why trade unions often fail to ask questions about such matters. It is asserted that the failure to ask should be treated, at most, as a technical oversight.

49. To be accurate, this Board has not said that unsolicited disclosure is only obligated after a board of directors has given its approval. In *Westinghouse*, the Board used the term *de facto* decision and, we might add, in the context of a decision that was not primarily cost related. In the same decision it also pointed out the supplementary obligation of a company to respond honestly to questions. In this respect we would observe that the bulk of solicited disclosure cases in the United States and the few in Canada that exist have related to factual information or data – wage rates, wage surveys, time studies, insurance costs and other employment related activity. (We point out that this Board has not yet had to set the ground rules to such requests. See Bartosic and Hartley, *supra*, for example.) Accordingly, it is not at all clear what a company's obligation is, if any, with respect to requests over plans. In *Westinghouse* the Board's reference to requests for such material emphasized the employer's duty to respond "honestly" thereby pointing out that a request could well trigger a misrepresentation which may later be relied upon. Moreover, questions by a trade union on specific plans for significant changes permit the trade union to assess the employer's response and decide whether the issue should be pursued. An equivocal employer response may encourage a bargaining proposal which will not be removed until an acceptable assurance is forthcoming. In short, requests and answers provide a self-regulatory mechanism and permit collective bargaining to resolve these problems, minimizing the need for labour board intervention. A failure to request information of this kind may also, in certain circumstances, suggest the union is satisfied with the appropriateness of a collective agreement (as it will stand) or that it believes it can do little about such significant change – a "What will come, will come" type of attitude. There is also an inherent uncertainty in defining the extent of an unsolicited disclosure duty beyond firm decisions. There is the problem of confidentiality surrounding such plans. And there is the collective bargaining impact of dropping such "incomplete thinking" on a bargaining table. These problems cannot be denied or minimized.

50. On the other hand, plans and decisions to close a plant can effectively extinguish

a bargaining unit and the relevance of the usual terms of a collective agreement. In this context, where a decision to close is announced “on the heels” of the signing of a collective agreement, the timing of such a significant event may raise a rebuttable presumption that the decision-making was sufficiently ripe during bargaining to have required disclosure or that it was intentionally delayed until the completion of bargaining. It can be persuasively argued that the more fundamental the decision on the workplace, the less likely this Board should be willing to accept fine distinctions in timing between “proposals” and “decisions” at face value and particularly when strong confirmatory evidence that the decision-making was not manipulated is lacking. This approach is sensitive to the positive incentive not to disclose now built into our system, and the potential for manipulation. Indeed, a strong argument can be made that the *de facto* decision doctrine should be expanded to include “highly probable decisions” or “effective recommendations” when so fundamental an issue as a plant closing is at stake. Having regard to the facts in each case, the failure to disclose such matters may also be tantamount to a misrepresentation. We might also point out that there are decisions taken because of costs which really ought not to be made until the underlying problem is discussed with the union to see if adjustments can be made and the decision avoided. However, for the reasons discussed above, we are not willing to adopt the *Ozark Trailers* test of “thinking seriously” for unsolicited disclosures as urged upon us by the complainant. The failure to reveal such “possibilities” as a general matter is not tantamount to a misrepresentation and therefore lacks the bad faith rationale developed in *Westinghouse* justifying unsolicited disclosure. The purpose of such information would be investigative and to facilitate the rational discussion purpose of the bargaining duty. Accordingly, the purpose of the information and the difficulties detailed above with unsolicited disclosure militate against any substantial expansion of the unsolicited disclosure obligation as elaborated to date. The interests of employees are real but the Board is not ignoring these interests by requiring a questioning approach to disclosure as a general matter. The position urged upon us by the complainant has too much potential for “greater heat than light” at the bargaining table. There is already enough uncertainty over precisely how significant and what nature a decision must be to trigger the unsolicited disclosure duty. Unsolicited disclosure must be understood to be exceptional and centered essentially on a bad faith rationale.

51. We now turn to the facts of this case. Mr. Gruber, Mr. Beettam and Mr. Gills testified they knew nothing about the plant closing during bargaining. Mr. Souccar testified that Mr. Haiplik came to him in early February and recommended the plant be closed. The company acted swiftly thereafter. The company’s position is that it needed to await the signing of a collective agreement to assess how firm its market support would be. We have serious concerns with the evidence supporting this position. There was no documentary evidence adduced by the respondent confirming the close but unmanipulated timing of the decision to close and the signing of the collective agreement. Mr. Haiplik never took the witness stand to justify in his own words why he waited until he did before coming forward to Mr. Souccar. The respondent company was clearly considering rationalization (i.e. plant closures) as early as April of 1982 and the Hamilton plant was the prime candidate. The reasons for the needed rationalization were not short-term market considerations but a fundamental excess capacity in the entire industry coupled with a deep recession. These problems were so extreme as to cause the company to seek out merger discussions with MacMillan Bloedel in early 1982 and to recommence these discussions on the very day the collective agreement was ratified. Accordingly, the basic problems requiring rationalization were present during and at the completion of bargaining. The claimed sudden erosion of the market in the short term just on the conclusion of bargaining is also not supported by any documentation and the surrounding facts.

This was not the first time the respondent had benefitted from an industry-wide strike. It was well familiar with the practice of its customers to share patronage between the respondent and its competitors. Moreover, not one customer was called to testify that it was even considering leaving more than its usual allocation with the company. Furthermore, the evidence does not support the claim of sudden market erosion after January 13th. Lay-offs began in November and continued in December. The lay-off decided upon on January 17 was part of this trend. There is absolutely no documented market analysis before this Board to support the respondent's assertion on the timing of this market erosion and yet the company claims to have been monitoring the situation day by day. We also point out that there was nothing new or sudden about the commitment of customers to U.S. sources and nothing new about the U.S. price structure, both contributing problems to the overall picture. Indeed, during the strike the company came to realize just how great a capacity each plant possessed. We also have the un rebutted statements of Denise Dellaire that the possibility of closing the plant was under study "for a number of months"; the information releases of the company to the union and the public confirming the long term justification for the closing; and the statements by Gruber and Beettam that the plant probably would have closed earlier had it not been for the strike. We also find it difficult to accept on the evidence before us that this company would make such a major decision as the closing of the Hamilton plant at an expenditure in excess of \$2 million without considerable formal analysis and documentation to support such a move in light of alternatives. Expenditures of nowhere close to this order appear to receive multiple reviews and analysis and are well documented. In fact, some form of formal analysis would appear to have been undertaken under Mr. Souccar's direction with the assistance of Corporate Planning personnel prior to the strike.

52. At the very least, the evidence before us raises a rebuttable presumption which went un rebutted that the company either manipulated the timing of its decision to avoid bargaining on the matter or withheld from the union a *de facto* decision which was simply awaiting the conclusion of the collective agreement for formal adoption and implementation. We are not satisfied that the timing of the closing related to short term market considerations as stated above and, therefore, on the evidence before us, infer that it related instead to the collective bargaining timetable. Given the closeness in timing between the end of bargaining and the announcement of the decision, and having regard to the fundamental impact of the decision on employees, the respondent was, on the evidence before us, obligated to call Mr. Haiplik to reveal and testify as to why he waited until he did. It is a "well-recognized rule that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies an inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure is attributed". See Sopinka and Lederman, *The Law of Evidence in Civil Cases*, 1974, at pp. 535-536; *Royal Trust v. Toronto Transportation Commission*, [1935] S.C.R. 671 at pp. 675-677; and *Murray v. Saskatoon*, [1952] 2 D.L.R. 499 (Sask.C.A.) at pp.505-506. As Vice-President and General Manager of the Container Division, Mr. Haiplik was, in the words of Mr. Souccar, "monitoring the situation". He was also one of the "operating people left to come up with an analysis on how to solve the over-capacity problem", and "responsible for making the decision with respect to a plant closure and in turn recommending a course of action". Certainly Mr. Haiplik's activities and duties in this regard must have put him in possession of information the disclosure of which would have elucidated the facts relating to the plant closure decision and its timing. The law of evidence clearly permits the drawing of adverse inferences against a corporation for the failure to call an officer or employee in the best position to testify on a matter in question: see *Lynch & Co. v. United States Fidelity & Guar-*

anty Co., [1971] 1 O.R. 28 (H.C.) and *Keelan v. Norray Distributing Ltd.* (1967), 62 D.L.R. (2d) 466 (Man.Q.B.). In all of the circumstances, absent a convincing explanation from the respondent as to why Mr. Haiplik could not be produced as a witness, the Board is entitled to draw the adverse inference of intentional delay. The absence of any authoritative documentation indicating timing also contributes to the conclusion of intentional delay. The Board believes it can take notice that a decision of this magnitude normally involves extensive discussions at several corporate levels, studies, and the solicitation of external advice. It is simply not credible that the respondent arrived at its decision, putting 180 employees, many with long service, out of work at a cost to itself in excess of two million dollars, in the cursory manner it claims. See Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Duty to Bargain* (1971), 71 Colum.L.Rev. 803 at 833; and Goldman, *Partial Terminations – A Choice Between Bargaining Equality and Economic Efficiency* (1967), 14 U.C.L.A. L.Rev. 1089 at 1097.

53. In any event, we find that the matter of the impending closing was so concrete and highly probable in early January and dealt with by the board of directors in such a perfunctory manner (in that there was no documentation or apparent consideration of alternatives), the company had a minimum obligation to say that unless a certain percentage of the new business was retained or unless there was a dramatic turn in the operation a recommendation to close would be made within the next few weeks. Having regard to the Christmas letter to employees; the productive second half of 1982; and to the then state of dialogue between local labour and management on the future of the plant, the company's silence at the bargaining table was tantamount to a misrepresentation within the meaning of the *de facto* decision doctrine established in *Westinghouse*. It may well be that the union could have contributed little to whether the plant had to be closed, i.e. "decision bargaining", but it had a vital interest in the "impact" of that closing on the employees it represented. As it turned out, the entirety of the actual collective bargaining between the parties was academic and the real issue between the parties (i.e. the closing) was never discussed. By remaining silent, the company converted a major bargaining issue into a thirty minute discussion and announcement on March 1, 1983. Further, it is no answer that the company's negotiators knew nothing about the impending closing. The company has a statutory responsibility to send informed representatives to the bargaining table.

54. This then brings us to the issue of remedy. We have already expressed the view that the typical back pay order and bargaining direction previously issued by the NLRB in similar cases had a considerable propensity for over-compensation and therefore punishment. This the Ontario Labour Relations Board cannot and should not do. See *Radio Shack, infra*. Furthermore, the failure of the union to ask questions during the bargaining given the overall history of this plant and the market conditions all plants involved in the bargaining were then experiencing may well be relevant in assessing the likelihood of a different collective bargaining outcome had the closing been raised and in fashioning a remedy. The union's actual proposal on the topic may be germane in this connection as well. On the other hand, the actual extent to which employees would have been cushioned from the closing over and above Article 18.26 having particular regard to the bargaining structure, is a matter of some uncertainty primarily because the respondent employer failed in its statutory obligation. As the Board stated in relation to a similar problem in *United Steelworkers of America and Radio Shack*, [1979] OLRB Rep. Dec. 1220 at 1261 upheld *Re Tandy Electronics Ltd. and United Steelworkers of America* (1980), 30 OR (2d) 29:

A general damage award to all of the employees in the bargaining unit of the kind we have in mind, would not amount to the dictation of contract terms. Rather, it acknowledges that the wrong the Board is addressing is not the denial of a right to a particular agreement, but rather the right to bargain collectively in pursuit of such a contract. Thus, it is the prospects of the employees of increased earnings from the exercise of the trade union's bargaining capacity in negotiations which have been impaired by the employer's wrongful acts and refusal to engage in collective bargaining. It is therefore this "loss" – the bargaining expectancy – that must be assessed. Never having tried to value this loss, we are unable and unwilling to conclude that such losses cannot be established from relevant and statistically meaningful material available to the parties. The law of damages has recognized as probative the experience of others similarly employed and, with the plethora of collective bargaining data available to the parties, it would not seem rash to think that reasoned argument can be made on this issue too.

55. The Board therefore finds and declares that the respondent contravened section 15 of the *Labour Relations Act*. The Board will therefore reschedule this matter for hearing to provide the complainant with an opportunity to establish by reasonable proof those losses sustained by the union and bargaining unit employees, if any, arising from the loss of opportunity to negotiate on the matter of the plant closing together with interest as appropriate. The Board will also make a labour relations officer available to the parties should they wish to have discussions before this matter returns for hearing. A board order directing a reopening of the plant is not practical (in that the property and machinery have been disposed of) and, on our view of the evidence, is not justified in the circumstances. This aspect of the claim is therefore denied. The Registrar is directed to reschedule this matter for hearing and determination on the issue of damages on the application of the complainant and the Board remains seized of this case for such purposes.

DISSENT OF BOARD MEMBER W. H. WIGHTMAN;

1. I must dissent from the majority decision based not only on my interpretation of the evidence before us but, as well, out of a deep concern for the future implications of so detailed a scrutiny of the collective bargaining process which can only add to the difficulties of engaging in business in this Province. It seems to me that a policy based on greater disclosure in bargaining is so fundamental a matter that the initiative is best left to the Legislature and not this tribunal responsible only for the ad hoc resolution of individual disputes.

2. Whereas a corporate decision to make a capital commitment can reasonably be expected to be based on documentation to support anticipated return on investment, (e.g. "cost/benefit analysis" and "market projections") a decision to minimize losses is more likely to be a judgment call based, in this case, on the performance of the plant over the preceding several years. It was the unrefuted evidence that, apart from those occasions when competitors were on strike, the Hamilton plant showed a dismal record. The 1981 strike was virtually industry-wide and by far the longest in the history of the industry. I do not find it difficult to accept the evidence of the Company that they entertained some hope of residual customer loyalty as a result of the extraordinary efforts on the part of the management and employees at Hamilton to meet the increased needs of their customers during that period. Nor do I have

diffulty in accepting their proposition that, had such customer loyalty manifested itself in larger orders and thus greater use of plant capacity, the decision to close might not have been made.

3. However, even if I were to join the majority in not accepting the evidence of company witnesses, in favour of a conclusion that the decision to close had merely been postponed, I would not join in a conclusion that Section 15 of the *Labour Relations Act* had been contravened.

4. I accept the evidence of Mr. Gruber when he tells us he conducted negotiations on behalf of the company with an awareness of case law which would have obliged him to disclose such a decision had it already been made but that he felt no obligation to disclose a decision which at that point was still tentative. Quite apart from the impact such a "disclosure" could have had on the negotiations, the subsequent evidence that customer loyalty in the industry is not existent can lead one to infer that such premature disclosure would have resulted in an even more rapid cancellation of orders and more precipitous closing of the plant.

5. While I can understand Gruber's reluctance to volunteer information or speculation which might be expected to work against this "last gasp" effort to save the plant, I find it much more difficult to understand the failure of the union to raise questions as to the future prospects of the plant in light of the testimony of their own witnesses to the effect that they recognized the tenuous position the company faced.

6. Had the union raised such questions as a minimum we could have expected Gruber to refer back to senior-most management as to precisely how he should respond in light of his awareness of the disclosure obligation.

7. A further concern as to the union's handling of its responsibilities to its members at Hamilton arises from an examination of the union demand (see para.2 of the majority decision) and the contrasting approaches taken by the company and the union as reflected in Mr. Souccar's letter of April 6, 1982. (see para. 17 of the majority decision). Whereas the Company proposes to give employees hired at other locations full recognition for all past company service (with all that implies in matters such as pensions, vacation entitlement, etc.), the union "demand", which was unilaterally dropped without ever having been spoken to, would have benefited Hamilton employees only in the event the Company were to open a new plant. It specifically precluded their absorption with seniority into "any Consolidated Bathurst operation currently under agreement with the International Woodworkers of America". Since over-capacity had been the problem for several years the probability of a new facility being opened seems unlikely in the extreme and gives an extremely hollow ring to this effort on the part of the union to protect its members.

8. I make these observations but no recommendations with respect to the conduct of the union in its representation of its members because I am loathe for this tribunal to delve into the internal affairs and judgment decisions of a labour union. I could only wish that we would exercise equivalent restraint in passing judgment on corporate decision-making.

9. It is in this latter connection that I fear the majority decision will prove harmful. The perception among the business community will be that, while Gruber negotiated in good conscience with respect to his understanding as to the onus of disclosure of decisions already made, the effect of at least paragraph 53 of this decision is, in my view, to change the general

rules of disclosure retroactively such that his company may be severely penalized. Moreover, companies may perceive themselves to be in a "no-win" position regardless of the stage to which corporate planning may have progressed short of a final decision.

10. Given the existence of a possible decision which may affect employment, this decision has the potential for creating greater confusion over the nature and timing of unsolicited disclosure. Moreover, the decision appears to ignore the following business considerations which must be kept in mind:

- a) disclosure in advance of the event and during negotiations may lead to;
 - a charge of bargaining in bad faith on the grounds that the "disclosure" was merely a "threat" by a company "crying wolf";
 - the possible loss of new orders or cancellation of existing orders such as to force an even earlier closure;
 - the disclosure to competitors of collateral information which may put them at a competitive disadvantage in other parts of their operations;
 - the creation of a climate in which a negotiated settlement may be impossible of attainment;

or

- b) disclosure following ratification which may lead to;
 - an award such as in the instant case with penalties of an indeterminate amount from the point of view of the company.

11. One fears that in a similar situation, if in fact the decision to close has been made, companies may be inclined to consider as an alternative the forcing of a strike so that the plant may be closed during the period when there is no operative collective agreement.

12. Even if one accepts the Board's interpretation of the Act as requiring the disclosure of decisions which have been made as good social and/or economic policy, I firmly believe we should go no further. Even then I would wonder what damage we are doing to the accommodative notion of collective bargaining and the right of the parties of interest to decide what priority they shall attach to each of the variety of issues the process has been expected to resolve?

13. In the final analysis I see no evidence offered by the union to meet its onus as complainant. I prefer both the evidence and the argument as presented by the Company and would have so found in dismissing the complaint.

PARTIAL DISSENT OF BOARD MEMBER B. K. LEE;

1. I am in concurrence with the Chairman's reasoning up to paragraphs 54 and 55. I do not consider the trade union's failure to ask the company in bargaining if it had any plans which would significantly impact on the bargaining unit during the term of the collective agreement under negotiation, relevant to the issue of remedy. I believe that an order directing the reopening of the plant would have been appropriate and, at the very least, substantial damages are merited. Accordingly, I disassociate myself from the phrase "if any" in paragraph 55.

2734-82-OH International Association of Machinists and Aero Space Workers (I.A.M.)
Local Lodge 905, Applicant, v. **Dowty Equipment of Canada Ltd.**, Respondent

Health and Safety – Worker refusing work because of fumes emitted by Bernite solution – Employer offer of alternate work refused – Worker leaving work on own initiative – Not paid for time missed – Employer having no right to assign alternate work during first phase of investigation – Wrongful assignment not intimidation – Docking of pay not penalty – Complaint dismissed

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. H. Wightman and W. F. Rutherford.

DECISION OF THE BOARD; September 20, 1983

1. This is a complaint filed pursuant to section 24 of the *Occupational Health and Safety Act, 1978* (hereinafter referred to as the Act).

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3. The Board dismissed the complaint in an earlier decision for reasons which were to be given in writing at a later date. The Board's reasons are set forth herein.

4. The complaint alleges that the grievor, William McInnis, was dealt with by the respondent in a manner contrary to the Act by seeking to have McInnis perform his regular job after he had complained that he believed it to be unsafe. The complaint alleges further that the respondent's actions were so intimidating of McInnis as to cause him to go home two and one-half hours before the end of his shift, for which time he did not receive any pay. The complaint contends that the respondent's actions violate McInnis' right under section 23(6)(b) of the Act to refuse unsafe work.

5. The relevant parts of sections 23 and 24 of the Act provide as follows:

[Sections omitted]

6. The Board's recent decision in *International Harvester Company of Canada, Lim-*

ited, [1983] OLRB Rep. June 898, discusses sections 23 and 24 of the Act in the following terms at paragraphs 23, 24 and 25 of the decision:

23. Section 23 sets out a code of conduct for employees and employers where employees have reasonable concerns about hazards to their health and safety in their work places and their employers disagree. First of all, employees can refuse to work but must report the circumstances of that refusal to their supervisors. Section 23 provides for a two-tiered investigation – initially by the employer immediately upon receiving the employee's report, and subsequently by Ministry of Labour inspectors after a continuation of the refusal. While the first tier occurs, the refusing employee must remain at a safe place near his work station (subsection 5) except, presumably, when his presence during the investigation requires something else (subsection 4). The employer, during this time, is given no right to assign alternate work, presumably because this would interfere with the employee's presence at the investigation and because the time taken up in the investigation is totally within the control of the employer. If, after this investigation, the employee continues to refuse to work because he has reason to believe his work or work place puts his safety in jeopardy and the employer continues to disagree with the employee's belief, then the inspectors from the Ministry must be called in. Pending this second-tier investigation, the employer can either assign "reasonable alternative work" or, where none is practicable, "other directions" which do not violate section 24. These options were made available at this stage presumably because the inspection might not get underway immediately and its duration, up to a including the inspectors' decision, is not fully within the employer's control. Once the inspector commences the investigation, it must proceed in the presence of the refusing employee (subsection 7). Therefore, while the employee (who continues to refuse after the first-tier investigation) may be directed to do other work or be given any other lawful direction prior to the commencement of the investigation or after its conclusion, he retains the right to participate in the investigation itself.

24. Section 24 ensures that an employee who properly seeks to utilize or has utilized section 23 is not interfered with through dismissal, suspension or other discipline, threats of dismissal, suspension or other discipline, penalties or intimidation because he/she is acting in accordance with the Act. It is important to note that section 24 does not provide remedies for failure to follow the procedures of section 24. Section 37 does. It provides that:

37.-(1) Every person who contravenes or fails to comply with,

- (a) a provision of this Act or the regulations;
- (b) an order or requirement of an inspector or a Director; or
- (c) an order of the Minister,

is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than twelve months, or to both.

(See, for example, *R v. Algoma Steel Corporation Limited*, (unreported), released January 22, 1981, Boyd, Prov. Ct. J.; *R v. Ornamental Precast Limited*, (unreported) released March 19981, Greco, Prov. Ct. J.). It provides that a person who contravenes or fails to comply with the Act is subject to a summary conviction punishable with fine and/or imprisonment. Our jurisdiction is not to remedy breaches of the Act (in particular section 23) but rather to determine whether section 24 has been violated. Similarly, proving section 23 has not been followed will not result in a finding that section 24 was violated. Proof that the procedures of section 23 were not followed, however, could be an ingredient in a determination that section 24 has been breached. A failure to follow the steps set out in section 23 would have to be explained and that explanation weighed with all the other evidence to assess whether section 24 had been violated.

25. Between the initial work refusal and the decision of the inspector, the refusing employee and the employer are essentially locked in a contest of persuasion. Each must assess the situation and make difficult judgment calls. If at any time the employer correctly assesses the employee's beliefs as unreasonable, the full range of disciplinary action is available and this Board will not have any jurisdiction to interfere. Since employees only have the protection of the Act in circumstances where they can show their beliefs were reasonable, the Act provides for the employee's participation in both tiers of investigations. The Board has recognized in previous decisions (see, for example, *Canadian Gypsum Construction*, supra) that after the completion of the first tier of investigation, there is an increased onus on the refusing employee to show that the refusal is reasonable. The limitations on what techniques the employer can utilize to persuade a refusing employee are set by section 24.

7. The evidence before the Board with respect to the events of March 22nd which are alleged to have created a violation of section 24 of the Act by the respondent reveals the following facts.

8. McInnis is a shipper/receiver and works in the respondent's hydraulics building. The products manufactured in that building involve the brazing of metals. The brazing process requires that the metals be cleaned in a heated solution of a substance called Bernite 45. When the Bernite is heated it emits fumes. Earlier problems with fumes emission had resulted in a series of discussions between the respondent's and the complainant's representatives on the plant health and safety committee and an undertaking by the respondent to install a higher capacity ventilation system which would exhaust the fumes and introduce fresh air more quickly. The area where McInnis does most of his work is approximately 20 feet from the vats containing the Bernite solution.

9. William Gimblett is the complainant's health and safety representative and repre-

sents the employees of the hydraulics building on the health and safety committee. About mid-way through the first half of the day shift on March 22nd, Gimblett received complaints from McInnis and another employee, Mike McCann that preparations were being made for brazing to be performed that day and the new ventilation system was still not installed. Gimblett went to the brazing area to investigate and met Richard Jones, the respondent's representative on the health and safety committee. No brazing had been started yet but the fumes from the Bernite vats were noticeable. Gimblett suggested to Jones that any employees who complained about the fumes be given alternate work in order to avoid a confrontation. There had been no work refusal by any employees at that point and no decisions were made and no action taken by Gimblett or Jones.

10. Around 1:00 p.m. Gimblett received a call from Barry Noland, McInnis' foreman, advising Gimblett that McInnis was refusing to work. Gimblett went to Noland's office to investigate and learned that the refusal was because of the fumes from the Bernite vats. Gimblett proceeded from Noland's office to the brazing area where he met John Withers, manufacturing manager of the respondent. The fumes were strong. Withers was diluting the Bernite solution with water. He had tested the solution and found it to be too strong. The fumes given off by the correct solution were relatively light, although some of the stronger fumes still lingered in the area. Gimblett and Withers were joined by Jones, among others, and they engaged in discussions about the problem of the fumes until approximately 2:30 when the group dispersed.

11. During most of this time McInnis had remained at the opposite end of the hydraulics building near an area called the seals storage, the same area where Noland's office is located. After Withers left the group in the brazing area he sought out McInnis in the seals storage area and told him that the Bernite solution had been improperly mixed. Consequently it had been emitting stronger fumes than was normal. He advised McInnis that the solution was now at the correct strength and giving off significantly reduced fumes. Withers invited McInnis to return with him to the brazing area and observe the change for himself. McInnis refused. Noland came over at this point and asked McInnis if he was prepared to unload a truck which was just arriving at the receiving doors. These doors are located at the same end of the building as McInnis' desk and are near the brazing area. McInnis answered Noland in the negative. Before Noland could respond to McInnis' answer, he was called to the telephone in his office. Withers left at that point.

12. Prior to Noland asking McInnis if he would unload the truck, Noland had offered McInnis alternate work away from the area where the fumes were and McInnis refused that work for reasons unrelated to the fumes problem. Noland advised McInnis that no other alternate work was immediately available and he would have to check and see if he could find anything else. He told McInnis to go in the meantime to the seals storage area, the furthest point from the fumes. McInnis followed those instructions and this is where Withers had found him.

13. The telephone call which had interrupted Noland's discussion with McInnis about unloading the truck had been from Gimblett. Gimblett advised Noland that he had received a complaint from McInnis about the alternate work which Noland had asked him to do. While Noland was talking on the phone to Gimblett, McInnis came to the door of Noland's office, told Noland that he was sick and was leaving to go home. Noland related this information to

Gimblett and commented that the problem with McInnis was resolved because he had left for home.

14. Nothing was said to McInnis the next day about his early departure and no disciplinary action was taken against him, but he was docked pay for the two and a half hours remaining of his shift after he left to go home.

15. Noland's and McInnis' evidence contains conflicting views about what exactly was said between them at the point McInnis left work. A fair reading of the evidence, however, satisfies the Board that McInnis left work early on March 22nd on his own initiative, probably because of his own perception and interpretation of the events following his first refusal to work. McInnis' perception notwithstanding, the evidence with respect to the nature of the alternate work offered to him and the manner in which it was offered together with Noland's later query about unloading the truck does not support a conclusion of intimidation contrary to section 24(1)(d) of the Act. For similar reasons, the Board finds that the evidence does not support a conclusion that the respondent was imposing a penalty contrary to section 24(1)(c) of the Act when it failed to pay McInnis for the two and a half hours remaining of his shift after he clocked out on March 22nd.

16. What does emerge from the evidence is apparent confusion among the representatives of both the complainant and the respondent and by the grievor McInnis with respect to when it is appropriate for an employee to be assigned to reasonable, alternate work once the employee has exercised his right under section 23(3) of the Act to refuse work where he has reason to believe that there is a hazard to himself or to other workers. As the Board observed in its decision in *International Harvester, supra*, section 23 of the Act sets up a two phase investigation of the refusal to work: the first phase investigation is conducted by the employer and the second phase is conducted by a Ministry of Labour inspector. The first phase begins when the employee who is refusing to work reports his concerns to his supervisor. During this phase, section 23(5) requires the employee to remain in a safe place near his work, although section 23(4) seems to contemplate his presence while the employer or the employer's representatives investigate the circumstances reported by the employee as causing his refusal. During this phase the employer has no right to assign alternate work to the employee, although there appears to be nothing to prevent the employee from consenting to perform alternate work. If the employee is not satisfied by the results of the first phase investigation, or by any steps taken with respect to those circumstances reported by him as the cause of his refusal and if he has reasonable grounds to believe that it is still hazardous to himself or others to perform his work, the employee may continue to refuse to do the work. If so, section 23(6) requires that the employer or the employee, or persons acting on behalf of either, shall cause a Ministry of Labour inspector to be notified of the refusal. At this stage, and pending the investigation and decision of the inspector, the employer may assign the employee to reasonable alternate work [section 23(10)(a)].

17. There is little doubt that Withers, Gimblett, Jones and others discussed assigning McInnis to alternate work after the Bernite solution had been corrected. There is no doubt that Noland offered McInnis alternate work and he refused. Since the second phase investigation had not been triggered at that time, the respondent had no right to offer the alternate work and McInnis was protected by section 23(3) of the Act when he refused the work. But as the Board pointed out in *International Harvester, supra*, the failure to follow the section 23 procedure will not result in a finding that section 24 has been violated, although that failure

would be a factor in determining whether section 24 had been breached. In this case, McInnis' premature departure eliminated any need or opportunity for Noland to pursue his inquiry with McInnis about unloading the truck. As a result the contest of persuasion between the employee and the respondent did not develop to the point where the reasonableness of the actions of both parties has to be assessed by the Board. The Board would only be indulging in speculation if it tried to determine what might have happened had the responsible party or persons triggered the second phase investigation, had McInnis remained at work and had Noland directed him to unload the truck.

18. In summary, the evidence shows the parties to have been confused about their respective responsibilities and rights under the Act. McInnis was offered alternate work at a point in the investigation of his refusal to work when the respondent had no statutory right to make such an offer. While that was contrary to the procedures prescribed by section 23 of the Act, the Board is satisfied on the all of the evidence before it that the respondent's actions did not constitute a breach of section 24. McInnis' premature departure from the workplace after being asked by Noland whether he would unload the truck, removed any need for the parties to report McInnis' continued refusal to work and cause the second phase investigation to be carried out. Thus failure to proceed to the second stage is not a factor to be considered in this case in determining whether section 24 was breached. Finally, the evidence does not support the allegation that the respondent's conduct towards McInnis caused him to leave early on March 22nd, so the withholding of two and one half hours pay does not constitute a penalty for the exercise of his rights under section 23(3) of the Act and a breach of section 24.

19. It was for these reasons the Board issued the earlier decision dismissing the complaint.

0638-83-U Labourers' International Union of North America, Local 506, Complainant, v. Global Demolition Ltd., Respondent

Discharge for Union Activity – Practice and Procedure – Unfair Labour Practice – Five grievors discharged soon after certification application filed – Employer inquiring of employees whether they joined union – Union relying on reverse onus and not calling evidence – Board satisfied with employer's explanation of bona fide lay-off and selection procedure

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *Chris G. Paliare and Michael Mihajlovic for the complainant; Norman A. Keith and Steve Teperman for the respondent.*

DECISION OF THE BOARD; September 26, 1983

1. This is a complaint filed under section 89 of the *Labour Relations Act* in which the Labourers' International Union of North America, Local 506 ("the union") has alleged that Global Demolition Ltd. ("the employer") has violated sections 64, 66, 70 and 79 of the Act with respect to the six grievors named in the complaint. At the commencement of the hearing into the complaint, Steven Mixemong was added as a grievor and during the course of the proceedings, the union withdrew its allegations with respect to Randy Adams and Joseph Mandamin. Therefore the grievors who remain as parties to this complaint are Jacob A. Aibens, Kenneth E. Sandy, Henry Pitawanakwat, John J. Pejko and Steven Mixemong.

2. The union alleges that the five grievors were discharged on June 22nd because they supported the union in its successful effort to be certified as their bargaining agent. The complaint contains detailed allegations concerning the conduct of the employer's president, Steven Teperman, from a time shortly after the application for certification was made until the discharge of the five employees. The union contends that his conduct constitutes a violation of the Act by the employer.

3. The findings of fact herein are from the evidence of Teperman, the only witness who testified at the hearing. After hearing his evidence, counsel for the union advised the Board that the union would not be calling any evidence because, in counsel's view, the employer had failed to satisfy the onus placed upon it in a complaint of this kind; a reference no doubt to the burden of proof placed on an employer by section 89(5) of the Act, when there is a complaint that a person has been dealt with contrary to the Act with respect to his employment, opportunity for employment or conditions of employment, that the employer did not act contrary to the Act. The Board's often quoted decision in *Barrie Examiner*, [1975] OLRB Rep. Oct. 745 described the nature of that burden in the following terms:

"What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof 'that any employer ... did not act contrary to this Act'. In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.* [1974] O.L.R.B. 450. In other words, the appearance of

a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.”

4. In terms of assessing whether the employer has acted out of anti-union motivation and therefore contrary to Act, the Board has described its task in the following manner in its decision in *The Ontario Educational Authority*, [1976] OLRB Rep. Nov. 721 at page 724:

The Board in assessing the employer's explanation, must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, the employment history of the grievor and his involvement in trade union activity, unusual or atypical conduct by the employer following upon knowledge of trade union activity, the timing of the termination or other alleged unlawful activity vis-a-vis the employer's knowledge of trade union organization and of course the credibility of the witnesses. (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278);

and further at page 725:

Similarly, the Board cannot allow a legitimate reason to mask an anti-union motive. The Board has long held that anti-union motive does not have to be the sole reason or even the predominant reason underlying the activity complained of for the Board to find that the Act has been violated. This approach has received judicial approval in the *Bushnell Decision* [1974] OR (2d) at page 442, affirmed at 4 OR (2d) 288. Accordingly, the Board must be prepared to examine all of the evidence circumstantial and otherwise, for the purpose of drawing inferences as to the credibility of the explanation put forward by the employer and in so doing it must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct. (See *Pop Shoppe (Toronto) Limited* [1976] OLRB Rep. June 299).

5. The employer's defense to the complaint is that the alleged discharges on June 22nd were in fact lay offs made for bona fide business reasons, untainted by any anti-union motive. The complaint and the employer's defense raise two questions for the Board:

- (a) is the reason given by the employer for the lay off the only reason;
- and

- (b) was any anti-union motive attached to the employer's selection of those employees who were laid off.

6. With respect to the first question, the Board is satisfied on the evidence before it that there were bona fide business reasons for laying off the five grievors on June 22nd. The remaining part of the question is whether that was the only reason for the lay off or whether any anti-union motive played a part in the decision. It is not disputed that the union filed an application for certification on or about June 7, 1983. The employer started in business in November 1982 and at that time the business consisted of Teperman, its president, and a secretary. The employer obtained its first job on March 17th, 1983 and as a result of that job, obtained some further work with the same client (hereinafter referred to as the Donway job). The employer's contract called for that work to be completed by June 30th at the latest, with an understanding between the client and the employer that the client could ask for earlier completion. Teperman also obtained two other jobs which were executed in May and June, each with separate clients unrelated to the first one. The last of these two jobs was finished by June 10th. Teperman failed to get two other jobs on which he had been bidding, one with his original client on the Donway job and the other with a prospective new client. Teperman learned that he had failed to get both jobs immediately prior to the lay off in question here.

7. The application for certification was made and processed pursuant to the construction industry provisions of the Act which do not require the Board to hold a hearing. Teperman first learned of the application on June 14th when he was contacted routinely by a Board clerk who was enquiring into whether notices to employees about the application had been posted as required. The employer had not received the Board's material by that date. A certificate ultimately issued to the union on June 20th. In response to a question from Teperman, the Board clerk informed him that he would need to supply the Board with a list of names of the employer's employees and specimen signatures which the Board required in order to compare them with the signatures on the membership evidence filed by the union. Teperman had the list prepared and then took a photocopy of it which he presented to each employee and asked the employee to place his signature next to his name. Teperman told them that this was part of the evidence which he had to supply to the Board. In examination-in-chief, Teperman volunteered the information that he had approached each employee individually on the job to get the signatures and at the same time asked each one if he had signed a union card. He told the Board that he had done this out of curiosity and not to threaten the employees. He stated also that he did not say anything to the employees about being laid off or fired if they refused to say whether they had signed union cards. Teperman disclaimed any knowledge that any person whom he had laid off had been involved in organizing his employees. He had seen a Local 506 organizer drive onto the Donway site and then leave it as soon as he saw that Teperman was on the site.

8. On June 16th, Teperman spoke to his employees as a group during the lunch period. This was the terminal date for the application, that is the day by which the union had to file its membership evidence, the respondent its reply and lists of employees and any employee who was going to oppose the application, a statement of desire in opposition to the union. Teperman expressed his views with respect to what he saw as being the advantages and disadvantages of a union. He told the employees that he had been informed by the person from the Board that employees could file a petition if they did not want the union. He stated that, if they felt as he did, they could file a petition, but since he thought it was already too late,

that day being the deadline, if the application came to a vote they could express themselves in the vote. Teperman reiterated these remarks to the employees at lunch time on June 18th.

9. There was no allegation in the complaint with respect to any meeting or discussion with employees on June 18th, but the particulars in the complaint include allegations that Teperman made statements which individually or collectively constitute violations of the sections of the Act contended in the complaint. Each of these allegations either was rebutted by Teperman's testimony to the Board's satisfaction or was not pursued by the complainant in its cross-examination of Teperman. In the result, the Board is left with the admitted fact that Teperman inquired of his employees whether they had joined a union and the fact that he laid off employees on June 22nd, allegedly because they were supporters of the union.

10. There is an internal inconsistency in Teperman's evidence with respect to when he asked his employees whether they had signed union cards. As noted above, in his examination-in-chief, he volunteered the information that he had spoken to the employees at the same time that he gathered their specimen signatures. During his cross-examination, in reply to a question about talking to the employees at lunch time on June 16th, he replied that it was then when he asked the employees about their union membership and that he did not ask about that matter when he got the specimen signatures. While this raises a doubt of just when he asked them about their membership support, it does not alter the fact that he did ask them. It is not critical to this decision whether it was June 14th or June 16th and whether it was done individually or in a group. The Board is not prepared to discount the rest of Teperman's testimony, as union counsel contends it should, based on that single inconsistency, having regard for its nature, the manner in which the testimony was given and his general demeanor as a witness.

11. The facts relevant to how Teperman selected employees for lay off on June 22nd are as follows. On June 20th, the employer was close to completing demolition of the last building on the Donway job so Teperman instructed his foreman to select a five-man crew and take it to a job site on Adelaide Street on June 21st to start work there. This job was one of the two new jobs which Teperman had expected to get. The foreman selected the persons who are the five grievors herein. During the evening of June 20th, Teperman was advised by the developer on the Adelaide Street job that the demolition work had been given to his general contractor. When the men showed up at that site on the morning of June 21st, there was no work for them so they were told by Teperman to report back to the Donway job site. That day all of the demolition work was completed and only clean up work remained. That clean-up work required six employees. Teperman decided to keep the two students whom he had hired through Canada Manpower and for whom the employer was entitled to receive some wage subsidies. He went over the time cards of the remaining employees with his foreman and reviewed their performance in terms of attendance, punctuality and reliability. Teperman testified that he and his foreman picked in this fashion the persons who were to be laid off and who are the grievors herein. He admits that he had been prepared to keep these persons employed on the Adelaide Street job, but explained that he was prepared to do so because he had been unable to hire any persons who were any more reliable. The employer retained four employees in addition to the students. They worked on clean-up of the Donway job site from June 22nd until June 28th. On June 28th the employer laid off the two students and three of the four other workers. The fourth one was the employee who had been trained to operate a hydraulic backhoe which was used on the site and who was retained until July 8th before being laid off.

12. Teperman testified that, when he was selecting those employees to be retained and those employees who would be laid off, he did not consider their union affiliation. If he had wished to do so, he would have been unable to because he had no knowledge of what it was. It is interesting to note that the Board's decision certifying the union, which is in evidence here, issued on June 20th. Since it was a decision without hearing under the construction industry provisions of the Act, the decision indicated, anonymously, the number of membership cards which the union had filed in support of its application. There were 11 in this case. The employer had only 12 employees on the date of the application so it would know from that decision that only one of its employees did not support the union. There is no evidence before the Board either way as to whether the employer had received that decision by the time Teperman was deciding which employees to lay off and which employees to retain. In either circumstance, Teperman either did not know which of his employees supported the union or knew that all but one did support it, without knowing who the exception was. Therefore there was nothing in Teperman's knowledge which would enable him to distinguish, in terms of their support for the union, those employees who were laid off from those employees who kept in employment. Nor is there any evidence before the Board from which it could establish directly or by inference that Teperman had such knowledge.

13. While the Board is concerned that Teperman, when he learned of the application, approached employees and asked each one of them if they had joined the union, there is nothing in his subsequent actions which would cause the Board to infer that it was because of their refusal to tell him whether they supported the union or because an application for certification had been made, that he laid off the five grievors and retained the other employees.

14. The employer, through its President, Steven Teperman, has come forward and given a credible explanation of its conduct and actions. That explanation included a rebuttal of the allegations set out in the complaint except for Teperman's admissions of having asked the employees whether they were members of the union. The employer's explanation withstood, to the Board's satisfaction, the test of cross-examination. Therefore, in the absence of contrary evidence and having regard for all of the evidence before it, the Board finds that the employer has met both elements of the test set out in the *Barrie Examiner* decision, *supra*. In the result, the Board finds that the employer's decision to lay off five employees on June 22nd and its selection of those employees who were to be laid off were made for bona fide business reasons and did not involve an anti-union motivation.

15. The complaint is dismissed.

1257-83-R Canadian Union of Operating Engineers and General Workers, Applicant, v. **The Regional Municipality of Halton**, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Practice and Procedure – Bargaining unit sought restricted to Social Service Dept. – Leaving 8 other departments unorganized – Existence of collective agreements in Province with recognition clauses restricted to Social Service Depts. not satisfying Board of appropriateness – No prima facie case for officer inquiry into community of interest

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members L. Hemsworth and L. Collins.

APPEARANCES: Bob Sleva, Claude Duchesneau, Lori Monteith, Elizabeth Wiltse and Michael O'Malley for the applicant; Keith Billings, Raymond Feig and Dennis Camm for the respondent; Colleen Rivers and Carm Cardillo for the objectors.

DECISION OF THE BOARD; September 30, 1983

1. This is an application for certification of a bargaining unit described as follows:

All employees employed by the respondent in The Regional Municipality of Halton in Ontario in the Social Services Department save and except supervisors/managers and persons above the rank of supervisor/manager and employees covered under subsisting Collective Agreements.

Subsequently, at the hearing, the applicant amended its unit to exclude those persons, organized or not, who are or would be covered by the *Hospitals Labour Disputes Arbitration Act*, R.S.O. 1980, c.205.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The applicant and the respondent are in disagreement regarding the description of the bargaining unit. The respondent claims that the following unit is appropriate:

All office, clerical and technical employees employed by the respondent in the Regional Municipality of Halton save and except supervisors, persons above the rank of supervisor, confidential secretaries to department heads and managers, cash management analyst, capital budget and debt budget analyst, systems analyst, nutritionist, safety co-ordinator, business development officer, administrative assistant to the chief administrative officer, the internal auditor, property manager, solicitor, employees of the personnel and law departments, persons employed in make-work programs funded by other levels of government, special projects engineer, waste disposal engineer, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation periods, persons employed for a definite term or task, persons cov-

ered by existing collective agreements and hospital employees within the meaning of the Hospital Labour Disputes Arbitration Act.

The respondent argues that to allow the applicant's unit would, among other things, unduly fragment the work force into a number of potential departmental bargaining units. If the Social Services Department were certified, 8 other departments would remain for potential organization. Part of a ninth department, Public Works, whose "outside workers" are now organized by a different union, would also remain. The respondent cites the following cases wherein the Board has indicated an aversion to similar fragmentation (*The Corporation of the Township of Markham*, [1969] OLRB Rep. Aug. 592; *Niagara Regional Health Unit*, [1975] OLRB Rep. April 376; *Corporation of the City of Barrie*, [1974] OLRB Rep. Nov. 813; *Westeel Rosco*, [1978] OLRB Rep. Nov. 1125).

4. The applicant relies on 15 collective agreements which show that the parties to those agreements have agreed to recognition clauses limited to Social Service Departments or their like. The applicant cited no decisions or certificates of this Board of assistance in attempting to persuade us that a departmental basis for certification is appropriate in the circumstances.

5. We have decided that the applicant has failed to show that even a *prima facie* case exists for the appointment of a Labour Relations Officer to gather evidence regarding the community of interest. The assertions which the applicant made to support its application fall short of what would be necessary for this Board to certify a department within a multi-department work force.

6. For all these reasons we hereby dismiss the application.

0206-83-R Graphic Arts International Union, Local 211 Toronto, Ontario, Applicant, v. **Haughton Graphics Limited**, Respondent, v. Objecting Employees, Interveners

Membership Evidence – Practice and Procedure – Two tiered fee structure used – Test whether present employees given reasonable opportunity to join at lower fee after certification met – Union offering non-collective bargaining benefits as incident of membership – Promising improved benefits and wages through collective agreement – Salesmanship short of misrepresentation, coercion or intimidation not subject to Board scrutiny – Union raising possible retaliation by employer not making membership evidence unreliable

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and S. Cooke.

APPEARANCES: J. James Nyman, M. Zajac and F. Barber for the applicant; Edward T. McDermott and C. Nash for the respondent; Walter S. Tiam Fook on his own behalf.

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER S. COOKE; September 9, 1983

1. This is an application for certification.

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5. The parties have been advised that the applicant's level of membership evidence is well in excess of that required for certification without a vote. the respondent, however, argues on a number of grounds that the Board should place no reliance on the membership evidence. Alternatively, the respondent argues that the Board ought to order a representation vote, in order to satisfy itself that the employees' true wishes have been ascertained. The grounds which the respondent puts forward are:

- (1) that the applicant's use of a two-tiered initiation fee (\$1.00 now, \$300.00 later) coerced employees into signing;
- (2) that the suggestion emanating from the union that the employer might close the operation or take other retributive action raised unjustified fears in the employees, and improperly portrayed the union as their only salvation;
- (3) that the applicant engaged in a form of improper "tied-selling" by tying a variety of union benefits simply to the act of becoming a member, irrespective of the question of representing employees as bargaining agent with respect to a particular employer; and
- (4) that the applicant improperly conveyed to employees the impression that certain benefits would *automatically* flow from a subsequent collective agreement, rather than be the subject of and subject to negotiations with the employer.

Charge number (1) is joined in by Mr. Walter Tiam Fook, an employee in the unit, who wrote to the Board and appeared on his own behalf.

6. With respect to the latter two points, the Board has most recently dealt with the question of “salesmanship” in the case of *Leon’s Furniture Limited*, [1982] OLRB Rep. March 404, and noted at paragraph 11:

The Board has drawn the line of regulation between salesmanship and improper conduct at fundamental misrepresentation, coercion and intimidation.

Section 7 of the *Labour Relations Act* provides:

7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j).

(2) If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.

(3) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union, and in other cases, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit.

The section, as can be seen, was drafted by the Legislature in terms of “members”, and the issue that the Board is called upon to decide is whether or not the employees in question want to become part of the trade union.

7. In the Board’s view, the applicant’s references to the benefits simply of joining the union, and to the benefits which might be anticipated in a collective agreement, do not, in the context of the evidence before the Board in this case, including letters distributed by *management* in response to the applicant’s campaign, cross the line of misrepresentation. We find that employees at this operation would be fully aware that what they were being asked to join was a “trade union” that would be representing them in bargaining with their employer, and that the anticipated benefits in a collective agreement would be the product of bilateral negotiations with the employer. On the evidence, employees could not be said to have been misled by any representations of the applicant, nor improperly influenced in deciding for themselves whether or not they wished to belong to the trade union. As the Board made clear in *Leon’s*, *supra*, section 7 of the Act does not require the Board to finely scrutinize mere elements of “salesmanship”, so long as the line of misrepresentation, coercion or intimidation is not crossed.

8. With respect to the arousal of employee fears of recrimination by the employer, this is a common enough fear of employees in an organizing context that it is difficult to imagine a case where the addressing of it by a trade union would undermine the reliability of that union's membership evidence. As well, any apparent misstatement of a particular employer's intentions can normally be cleared up by communications from management on its own behalf, as in fact took place in the case before us.

9. There was also a suggestion arising from the evidence of a company witness, Mr. Kearns, that threats of physical violence were made to him on the road when stopped by someone whom he took to be a representative of the applicant. This latter question was never totally clarified, but even if the Board were to find on the balance of probabilities that the individual encountered by Mr. Kearns was in some way connected to the applicant's organizing campaign, the Board is not satisfied, having regard to Mr. Kearns' own tendency, demonstrated as a witness, to be somewhat belligerent and defensive, that the incident disclosed any evidence of threats being used by the applicant in connection with the mere solicitation of membership evidence.

10. The real issue in this case centres around the applicant's use of the two-tiered fee structure in the campaign. Such usage was also the main focus in the *Leon's Furniture Limited* case, *supra*, and the Board noted, at paragraph 11:

... The Board has not attempted to lay down standards of conduct aimed at responding to confusion and misunderstanding. Rather, it has tried to strike a balance between competing interests by censuring conduct that could deter, coerce or mislead the reasonable employee. The reduced payment before certification has been viewed by the Board as a border-line tactic which has sometimes crossed the line of acceptability.

After reviewing its jurisprudence on the subject, and particularly the case of *Alex Henry*, [1977] OLRB Rep. May 288, the Board concluded:

20. While [in *Alex Henry*] there had been no explicit linking of the higher initiation fee to an employee's job security, the Board found that an employee might reasonably see this link and therefore held that the full-time union organizer is under a duty to explain in detail how his statement might come to pass. Once having raised a topic that relates to job security and amounts to a significant financial enticement, there is an affirmative obligation on the organizer to be totally candid. Therefore, in *Alex Henry* the Board concluded that the bald statement "\$2.00 now or \$50.00 later" crosses the boundaries of acceptable salesmanship. However, instead of prohibiting a two tier initiation fee structure for the purposes of an organizing campaign, the Board has instead required complete disclosure on how it would impact on the employee who refuses to sign a membership card *before the trade union is certified*. This, it seems to us, is a reasonable approach given the reality that many trade unions customarily reduce their initiation fees for the purposes of organizing campaigns.

(emphasis added)

11. The basis of the Board's concern is set out in plain terms in an earlier portion of the decision:

10. The statute permits the Board to certify applicant trade unions to represent employees based upon written authorizations involving the payment of at least \$1.00 where such "membership documents" are properly executed and witnessed and where the application is supported by a declaration made by a knowledgeable official, declaring that the monies were paid as the membership documents indicate. See for example Form 9 and sections 1(1)(l) and 103(2)(j) of the Act. Thus, the Board relies on the execution of such membership evidence as an indication of the true wishes of employees and where more than 55 percent of the employees in the bargaining unit are members of the trade union, the Board will usually certify the applicant without a representation vote. However, because of the "hearsay" quality of membership cards, a fact demanded by the membership secrecy section of the Act (see section 111(1)), conduct by organizers that obscures the primary reason why an employee signed a membership card is of concern to the Board.

The Board accordingly sent a clear signal that a "special" initiation fee to eliminate the financial impediment to organizing would continue to be acceptable; but not to the point where the same device may be held out as the threat of a "penalty" to those employees who would refrain from joining prior to the union becoming certified. The union, in other words, must not use this organizing tool in such a way as to cause the Board to doubt whether employees have joined the union of their own free choice, or simply as insurance to avoid the risk of being required to pay the full amount of the initiation fee if the union is successful. The proper question is whether the employees wish to become part of the trade union or not, and organizing campaigns ought to be won or lost on this basis. Any two-level system of initiation fees causes a problem for the Board so long as the higher level is made to apply *before or immediately upon certification* of the trade union. In order to prevent this organizing device from being a distorting factor in assessing employees' true wishes, the two-tiered system must allow all employees employed at the time of the organizing campaign a reasonable opportunity to join for the lower fee *after* it has been determined whether the union will be certified. This is recognized to be already the practice of at least certain of the trade unions in the province, and conformity to it by others would seem to be no more than the Act requires. The practice of the present applicant, in fact, is entirely in conformity with the Board's requirements. The issue which arises here, however, is the manner in which the applicant has communicated its practice to the employees of the respondent.

12. The main organizing meeting in this campaign took place on April 23, 1983, at the Howard Johnson Hotel. The applicant handed out at the plant gates a number of pieces of literature prior to this meeting. At the bottom of the first one, following a list of advantages to joining the union, was a line which read:

We have a 100th Anniversary Special *INITIATION FEE* Don't miss out

Also, prior to the meeting, a second leaflet was handed out which listed in greater detail the various benefits to union membership, and which contained the following reference to the initiation fee:

SPECIAL INITIATION FEES - \$1.00 (normally between \$200.00 to \$350.00).

And finally, in the last leaflet before the meeting, the reference was:

REMEMBER

(A) Initiation Fee is only \$1.00 (including expelled members)

Mike Zajac, the key officer involved in this organizing campaign, testified that the present system of allowing employees to join the applicant for a dollar was put into effect in the fall of last year (the union's 100th anniversary) to correspond with what other trade unions organizing in the field were offering. He testified that the arrangement is that all employees for whom the union becomes certified are allowed to join for the dollar, not only up to the date of certification, but up until the time that a first contract is actually signed. (Previously, employees who had paid their dollar and who wanted to complete their initiation into the union after a certification application was successful were required to pay a further amount of \$25.00 in lieu of the full fee.) Mr. Zajac testified that the initiation fee was only one of the subjects discussed with employees at the April 23rd meeting. He began by explaining the scheme of the *Labour Relations Act* for certification, particularly the requirement of fifty-five per cent for outright certification, and went on to explain that there would be a meeting of all employees prior to any bargaining to put together the proposals which the union wanted to table. Mr. Zajac testified that there were no inquiries at this meeting with respect to the initiation fee, but that he explained it anyway as a part of his normal dissertation. There were some 30 to 35 employees at the meeting, and membership cards were ultimately obtained on behalf of all of them. These represent approximately half of the cards collected in this campaign. At the meeting Mr. Zajac explained that the dollar initiation fee remained in effect up until the time that a contract was signed, and that after that time the applicant's regular initiation fees would apply. These are set out in the union's constitution which outlines a sliding scale of fees ranging roughly from \$200.00 to \$350.00, depending on an individual's weekly salary. There were, however, questions asked as to whether everyone had to join the union, and Mr. Zajac responded that it would be up to the people at a meeting to decide whether they wanted a closed shop. Mr. Zajac further testified that he then explained the two basic options that were open on the subject, being a fully closed shop, where everyone has to join, as opposed to the situation where existing members must maintain their membership, and all new employees must join, but anyone else is required only to pay dues, in accordance with the law of Ontario.

13. Mr. Zajac let everyone at the meeting know that the union representatives would be at the hotel on April 26th and 27th, to meet with any other employees interested in joining the union. Mr. Zajac testified that he heard nothing more on the subject of the applicant's initiation fees other than two telephone inquiries from employees asking him for clarification on the dollar versus \$300.00, indicating that they had heard conflicting versions in the plant. Mr. Zajac testified that he explained to these employees that the dollar would apply up until the time that a contract was signed, and that after that the regular initiation fees would apply.

The union subsequently issued a final handbill, on May 4, 1983, and in it Mr. Zajac included a statement on initiation fees, he said, to "clear the air". That statement read:

REMEMBER

(A) INITIATION FEE is only \$1.00. (Regular Initiation fees will be in effect when we get a contract as per our Local By-Laws).

The "terminal date" for this application was several days later, being May 9th, and all of the leaflets in the campaign set out the applicant's address and telephone number.

14. The evidence of Walter Tiam Fook is that he returned from vacation on April 23rd to find the issue of unionization being hotly debated in the print shop. Mr. Tiam Fook is, for his own reasons, resolutely anti-union, and appears to have become involved in frequent arguments with a number of the union's supporters. One employee, Rick Gouin, told him that if he joined with the rest of the guys, he would only have to pay a dollar, but if he left it to later, it would cost him between two and three hundred dollars. Mr. Tiam Fook indicated he did not wish to join the union and Mr. Gouin said that he would have no choice because if the union got in, he would either have to pay the \$300.00 or look for another job; he would not be allowed to touch any of the machines. Mr. Tiam Fook never did sign a card, but wrote to the Board complaining of "coercion" and "intimidation" over the union's initiation fee, and the fact that he was told he would ultimately have to pay it to keep his job. He did not call the union to verify Mr. Gouin's statements because, he said, he "wasn't interested". Mr. Tiam Fook testified that a number of other employees complained to him about the initiation fee, but he called no other evidence.

15. The respondent employer called Fred Blakelock, a maintenance man, as a witness. Mr. Blakelock also made it clear that he, for his own reasons, had no interest in unions, based on his experience in Britain. Another employee, Colin, approached him and told him about the meeting the Saturday before. Colin then began reading from one of the union's leaflets the list of benefits to joining the union, and also the reference to the applicant's initiation fee. Colin said that if Mr. Blakelock joined now, it would cost him a dollar, but later it would cost between two and three hundred dollars. Colin also said that a majority had joined, and Mr. Blakelock would be "left out in the cold" and deprived of the union's benefits. Mr. Blakelock replied that he doubted he could be denied the benefits once he had paid his two or three hundred dollars.

He was approached by another employee, Silvano, who asked him if he was aware of the union meeting the previous Saturday. Mr. Blakelock responded that he was. Silvano then asked him if it were true that it would cost someone a dollar to join now, as against two to three hundred dollars later. A third employee, John, came in, and all three began to discuss the cost of joining. John said he did not really understand what the situation was concerning the union's initiation fee, and said he was going to call someone to find out. That was where the discussion ended.

16. The employee Doug Kearns also testified about approaches that were made to him in the plant. Another employee, Jim Phillips, came up to him in the cafeteria and asked him if he had joined the union and been to the meeting. Mr. Kearns said "no" to both. Mr. Phillips stated that they already had 80 per cent of the people signed up, and that if Mr. Kearns

paid a dollar, it would not cost him \$300.00 later; but if he did not pay now, it would cost him. Like the witnesses before him, Mr. Kearns however, if the applicant by its conduct left employees with the impression that its practice was something different, he testified, he liked "all the fancy stuff you could get for a buck", and "wasn't interested in paying no \$300.00".

17. As noted earlier, the practice of the present applicant in allowing employees to join for a dollar up to the point when the first agreement is signed is in conformity with the minimum requirements which the Board's inquiry under section 7 of the Act appears to demand. This would be little consolation to the Board, however, if the applicant by its conduct left employees with the impression that its practice was something different than it was. On the facts before us here, the Board does not find the applicant guilty of such conduct.

18. The applicant did, in its literature, set out what were its "normal" initiation fees, indicating the extent of the "bargain" that employees were getting, and it also exhorted employees not to miss the "special anniversary" fee. This latter reference contained an element of "puffing", in that the "special anniversary" part was really the decision of the applicant in the anniversary year to allow employees who had paid their dollar for the purpose of their application for membership before the Board to actually join the trade union and be inducted into membership for the same dollar, rather than the twenty-five dollar fee applicable previously. Mr. Zajac acknowledged that he hoped this change in the applicant's fee structure would continue forever. He did, in any event, clearly explain that *all* employees would have the opportunity to join for the dollar right up to the point of signing the first contract - to the 30-35 employees in attendance at the meeting of April 23rd, and to any employees who called him about the initiation fee subsequently. On the other hand, Mr. Zajac candidly acknowledged, with respect to the first contract being the cut-off point, that, beyond those employees, "if an employee didn't ask, he wouldn't know". And for that reason, in light of the applicant's own literature, the handout of May 4th is important. To the extent that any confusion may have arisen from the *written* propaganda of the applicant, the May 4th leaflet specified clearly that the opportunity to join for the dollar continued until the point that a first contract was settled.

19. The only "organizers" used by the applicant in this campaign were its outside professional staff, and no representative of the applicant did, in fact, ever expressly state that an employee at Houghton Graphics who did not join in the organizing drive would be required to pay a higher amount "later". Such statements arose explicitly only in discussions amongst the rank-and-file employees, and there was, in those discussions, no elaboration as to when "later" was. Any doubt (and there does appear to have been some) could readily have been clarified by a call to the applicant, by any employee who was interested. As the Board commented in *Crenmar Services Limited*, [1978] OLRB Rep. Jan. 48, for example, in dealing with a similar "two dollars now, 250 dollars later" statement:

20. Unlike the situation with a union official, a rank-and-file employee is not in a position to seek to achieve the consequences of any statements he may make during a union organizing campaign. Further, employees upon hearing any statements made by rank-and-file employees concerning what a union might do in the future can always check out the accuracy of those statements with a responsible union official before signing a membership application. Having regard to these considerations, the Board

is generally less willing to infer that a reasonable employee is likely to be improperly influenced into signing a membership card on the basis of statements made by a rank-and-file employee than it is with respect to statements made by a union official. (See: *Canadian Electric Box and Stampings Limited*, [1964] OLRB Rep. Sept. 284; *Green Giant of Canada Limited*, [1973] OLRB Rep. June 376 and *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. 611.)

And in the same vein, dealing with precisely the same issue, see: *Hancock Sand and Gravel*, [1978] OLRB Rep. Oct. 928; *Bond Structural Steel (1965) Ltd.*, [1979] OLRB Rep. Dec. 1137.

20. The applicant in this case, in any event, in the handout of May 4th, five days prior to the final date set by the Board for advising it of any changes in employee wishes, resolved in clear terms any ambiguity which may have existed with respect to the timing of its two-tiered initiation fee. Only one employee who had signed a card wrote to the Board indicating that he had paid a dollar on the basis of an incorrect statement of the facts. It is interesting to note, on that point, that Mr. Tiam Fook distributed copies of his letter to other employees whom, Mr. Tiam Fook testified, were as upset as he was over the initiation-fee issue, but none of those employees saw fit to remit a letter to the Board.

21. On the evidence, the Board is satisfied that the membership cards filed by the applicant are a reliable indicator of the employees' wishes, and the charges of the company and Mr. Tiam Fook are rejected.

22. On the basis of all of the material before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 9, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

23. A certificate will issue to the applicant.

24. The decision of Board Member J. A. Ronson will follow.

0681-83-M Jacob Immanuel Schochet, Applicant, v. OPSEU, Respondent Trade Union, v. **Humber College**, Respondent Employer

Religious Exemption – OFL Convention passing resolution urging CLC to support Palestine Liberation Organization – Applicant not claiming religious objection to collective bargaining – Objecting to paying dues to OPSEU until it publicly disassociates from OFL resolution – OPSEU having no policy on issue – No evidence of how OPSEU delegates voted at Convention – Applicant giving unreasonable interpretation to personal or political viewpoint – Objection too remote in relation to OPSEU – Dismissed

BEFORE: George W. Adams, Q.C., Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *J. I. Schochet on his own behalf; Paul J. J. Cavalluzzo, Paul Sheppard and Bill Kaplan for the respondent trade union; no one appearing for the respondent employer.*

DECISION OF THE BOARD; September 14, 1983

1. This is an application under *The Colleges Collective Bargaining Act*, R.S.O., 1980 C.74, filed by Rabbi Dr. J. Immanuel Schochet. He seeks an exemption from the payment of trade union dues as provided for by a collective agreement between the Ontario Council of Regents for Colleges of Applied Arts and Technology ("the Colleges") and the Ontario Public Service Employees Union (OPSEU). Dr. Schochet's letter of application sets out the grounds to his application. It reads:

I have been referred to you with regard to the following matter.

As a full-time teacher in the Ontario Community College System (since 1971), I have to pay dues to the OPSEU which is a member of the OFL. As the Tribunal is surely aware (from the *Forer v. OPSEU* case, 1983, your file T/32/82), the OFL has passed a resolution in favour of the PLO terrorist organization – which therefore is technically and morally supported by the OPSEU. Like Mr. Forer, I regard this resolution as a personal affront and attack against my faith and identify as a Jew. There is no way that I can support a group or union in either financial or moral manner that acts contrary to my religious and moral convictions. Thus I appeal my obligation under the *Collective Bargaining Act* to have any of my funds channelled to said union and would like the equivalent amounts to be remitted to a recognized charitable organization of my choice – as provided by the Act where religious convictions preclude membership and/or support. Needless to say I would like to see this redirection of my contributions to be retroactive to the date of the passing of the resolution.

I look forward to hearing from you as to further procedures or actions to be undertaken by myself to make this appeal and request effective.

2. The applicant is a full-time teacher of philosophy at Humber College. Before dues became compulsory under the most recent agreement, he was not a member of the union nor did he pay dues. He has no religious objection to collective bargaining but rather his objection arises because of OPSEU's participation in an Ontario Federation of Labour Convention in November of 1982 where the following resolution was adopted:

WHEREAS the Camp David agreement has led to peace between Egypt and Israel but not to an enduring peace for the region and,

WHEREAS the Israeli government's decision to invade Lebanon resulted in massive destruction of life and property and subsequent events especially the massacre of hundreds of civilians by Falangists in Beirut and,

WHEREAS this incident shocked and outraged world opinion and resulted in the condemnation of the Begin government by the United Nations the World Council of Churches and a significant proportion of the Israeli population and,

WHEREAS any lasting political settlement must include the Palestine Liberation Organization the legitimate representative of the Palestinian people,

THEREFORE BE IT RESOLVED that the OFL urge the CLC to call upon the Canadian government to support all avenues toward lasting peace in the region including:

- withdrawal of all foreign troops from Lebanon and their replacement by a United Nations peace-keeping force,
- recognition of Israel's right to live within secure borders based on pre-1967 boundaries
- recognition of the right of the Palestinian people to a secure and independent homeland,
- recognition of the PLO as the legitimate representative of the Palestinian people.

3. The applicant is also a Rabbi to the Kelcer Congregation at 2941 Bathurst Street in the City of Toronto and has been for the past twenty-five years. He is a member of the Rabbinic Council of Ontario and a member of the executive of the Rabbinic Alliance of North America. He testified that he is the author of some thirteen titles dealing with the Jewish religion and theology. He gives lectures on these topics in Canada and abroad. He has a bachelor of arts in philosophy; a master of arts in philosophy; a master of arts in religious studies; and a doctorate in philosophy.

4. He testified that according to the Jewish religion there is no distinction between religion, peoplehood and nationhood. This interrelationship, he submits, is absolutely pivotal

in understanding his religious concern for the security of the Holy Lands and the rightful access of Jewish people to such territory. He submits that any denial of a special relationship between Jews, Judaism and the land of Israel is an attack on or a basic denial of Jewish religious principles based on the Jewish bible, religious codes, and traditions. The Board was told a religious Jew must affirm his special relationship to the Holy Land in daily prayers, the precept of supporting Jewish settlements there, and, if possible, personal participation in such settlements. The effect, submits the applicant, is that a Jew by virtue of his religion is *ipso facto* a religious Zionist. He submits that the Palestine Liberation Organization (the PLO) is an avowed anti-Zionist, anti-Jewish organization which denies the special relationship between Jews and the Holy Land. It attacks individuals and institutions of religious worship and education throughout the world. In this respect reference was made to the Paris massacre, notorious hijackings and deaths in Antwerp and Brussels.

5. The following objections were made to the OFL resolution. He had no fundamental quarrel with its preamble nor with the first bullet point of the resolution. He did, however, object to the resolution recommending pre-1967 boundaries because this meant a voluntary surrender of territory embracing the Holy Lands and this was contrary to Jewish religious law. It would also narrow defense lines and thereby violate Jewish religious law by exposing Jewish settlements to danger. The paragraph, in his view, also implied a denial of inherent Jewish rights to the most sacred rights or locations of Judaism which until 1967 had been kept under the illegal occupation of the Jordanian Army. Bullet point three was not disputed but paragraph four was objected to. Dr. Schochet testified that a central covenant of the PLO involves a refusal to recognize any Jewish state as a matter of principle.

6. On cross-examination he testified that prior to 1981 he did not pay union dues because of "personal feelings" as opposed to religious convictions with respect to certain policies of OPSEU. However, in 1981 when dues became compulsory he paid them and no religious objection arose at that time. It was not until the November 1982 OFL convention that the problem giving rise to this application arose. Dr. Schochet was aware that the Canadian Labour Congress, to which OPSEU also belongs, ultimately ignored or rejected the OFL resolution. By letter dated January 5, 1983 Mr. Dennis McDermott, President of the CLC, wrote to Mr. Terry Meagher, Secretary-Treasurer of the OFL. The letter reads:

This will acknowledge receipt of your December 21st letter with respect to the resolution on the invasion of Lebanon endorsed by the recent Ontario Federation of Labour convention, and inquiring if the matter was discussed at the December 1982 meeting of the CLC Executive Council.

This resolution was the subject of a lengthy debate by the Council, following which a decision was taken to reiterate the position of the CLC on the Middle East. For your information I enclose a copy of our position paper which was released in August 1982.

With best wishes and kind personal regards, I am,

The enclosure reads:

THE LEBANON

The Canadian Labour Congress views with very great concern the

tragic situation in the Middle East. In this connection Dennis McDermott President of the Canadian Labour Congress has issued the following statement:

Long years of valued association with the trade union movements of Israel and the Lebanon have given the Congress not only an exposure to the realities of the area but also a strong sense of commitment to the need for an effective peace in the Middle East.

This has to be built on negotiations which reflect two sets of obligations. For their part, Arab countries and peoples must categorically accept Israel's right to exist and live within secure and recognized boundaries. Continued violence against Israel is totally incompatible with such acceptance.

For its part, Israel must honour the Camp David Accord, as it did in withdrawing from the Sinai, by recognizing the legitimate rights of the Palestinian people and their just requirements.

That the principal requirements will remain a national homeland for the Palestinians is obvious to the CLC, and it is the view of the CLC that the hatred of the PLO terrorist organization for Israel is in fact a major impediment in the way of the creation of a Palestinian homeland.

The Israeli invasion of Lebanon may have broken the power of the PLO, enabling the Palestinian people to secure constructive representation, and this outcome would be welcomed by the Canadian Labour Congress.

We do not welcome, and we emphatically deplore, the loss of life in Lebanon. Through the trade union movement in that country, the CLC will contribute to relief and re-building efforts once the Lebanese authorities are actually exercising sovereignty in their own country.

This they have not done since the arrival of the PLO, following the expulsion of this organization from Jordan and then Syria.

The PLO has brought Israeli retribution to the Lebanon. It is impossible for the CLC to ignore that it has brought much more. Its major legacy has been the civil war in 1975 and 1976, when 60,000 people were...[exhibit incomplete].

The Lebanon has never recovered from those savage months. In the first few days of this year, a Syrian army spokesman informed a Lebanese newspaper, Al-Hahar, that "West Beirut is flooded with armed people carrying heavy and medium-size weaponry. In every house there is either a recoilless launcher, a heavy machine gun or a mortar..."

These weapons were not idle in the months preceding the Israeli invasion, and in May 1982, 155 people were killed in the fighting that has become the curse of Lebanon since the arrival of the PLO.

The Israeli invasion of June 1982 has greatly increased the civilian death toll, and this we regret and condemn. The CLC strongly supports the position adopted by the Labour Party in Israel that towns must be spared aerial bombardment in order to safeguard the non-combatant population as far as possible.

Here again, the PLO has not helped. At the beginning of June, the Israelis shelled the Beirut Stadium, but what they hit were PLO ammunition stores, military vehicles and rocket-carriers, as reported in three Lebanese newspapers.

Alongside our Israeli trade union counterparts, the CLC calls for the withdrawal of all foreign forces from the Lebanon, and supports the establishment of an independent and sovereign government in Lebanon strong enough to prevent the country being used to launch terrorist attacks against its neighbours.

Dr. Schochet read these documents and indicated he had no objection to them. However, in his view the CLC position made no difference. The OFL was an independent association of trade unions to which OPSEU belonged and in Dr. Schochet's opinion "OPSEU can't hide behind the CLC". Harm has been done by the publicity given the OFL resolution and the only acceptable response for OPSEU, stated Dr. Schochet, would be for it to renounce the OFL resolution publicly by a press release. This act alone would remove his religious objection.

7. The applicant was then cross-examined on a range of issues illustrating the political and religious interrelationships of active debate over the Holy Lands going on in Israel today. The witness was forced to characterize Jewish personalities and organizations espousing positions similar to the OFL resolution as "secular" although not necessarily "anti-Jewish". He also admitted to the existence of differences of opinion over what is political and what is religious although he believed he could resolve these differences. In this respect, he acknowledged that as a religious man he needed to seek advice from the military on matters of security but stated "everything...is in the context of religion". He also agreed that the West Bank could be surrendered and religious law not violated "depending on the conditions".

8. Mr. Louis Lenkinsky, Executive Assistant to the President of the OFL, testified that the OFL resolution "is now dead" in light of the CLC response. Mr. Lenkinsky is also a member of the National Executive of the Canadian Jewish Congress. The OFL is obligated, he testified, to support the principles and policies of the CLC. The OFL is made up of 800,000 affiliated members, 120 national or international trade unions and 1800 local unions. Any member, the Board was advised, is entitled to bring a resolution forward for consideration. The OFL, Mr. Lenkinsky testified, has ties with the labour movement in Israel, although the CLC has jurisdiction over all "foreign affairs". In this latter sense, the resolution itself was contrary to CLC policy. The OFL does not have contact with the Palestinian trade union movement.

9. Mr. Patrick Shepard is a senior officer of OPSEU. He testified that OPSEU has never formulated a position on the PLO or on other issues in that region. Policy is made at OPSEU's annual convention. The OFL resolution does not constitute a policy of OPSEU he testified. He stated that OPSEU did not have to react to the resolution because "it was dead within two months". Moreover, there had been no annual convention since November of 1982 to comment on the resolution from a policy perspective.

10. Dr. Schochet relies on a decision of the Ontario Public Service Labour Relations Tribunal granting an application made pursuant to section 16(2) of *The Crown Employees Collective Bargaining Act*, R.S.O. 1980, c.108 on essentially similar grounds. Known as the *Forer* case (T/32/82), the decision reads:

This is an application pursuant to Section 16(2) of *The Crown Employees Collective Bargaining Act*, R.S.O. 1980, c.108 wherein the applicant objects to the payment of union dues because of his religious convictions.

Having regard to the evidence and to the submissions of the parties and for reasons given in *Van Harten v. OPSEU*, July 5th, 1976 unreported, it is our view that the order should be granted. The evidence in this case is readily distinguishable from the evidence in *Boulakia*, 1983, unreported (Ontario Labour Relations Board) and falls well within the principles enunciated by this Tribunal in previous decisions when exemptions were granted.

Accordingly, we order that the provisions of the collective agreement pertaining to the payment of dues or contributions to the respondent employee organization do not apply to the applicant and he is not required to pay dues or contributions to the Ontario Public Service Employees Union and that the amounts equivalent thereto are to be remitted by the employer to a charitable organization. If the parties are unable to agree, then each should inform the Tribunal in writing and include therein any representations as to the charitable organization to be designated by the Tribunal.

11. The submissions of Mr. Cavalluzzo and Dr. Schochet were particularly able but do not require a full review in light of our decision. Section 54 of *The Colleges Collective Bargaining Act*, 1975 c.74 provides:

54.-(1) The parties to an agreement may provide for the payment by the employees of dues or contributions to the employee organization.

(2) Where the Ontario Labour Relations Board is satisfied that an employee because of his religious convictions or belief objects to paying dues or contributions to an employee organization, the Ontario Labour Relations Board shall order that the provisions of the agreement pertaining thereto do not apply to such employee and that the employee is not required to pay dues or contributions to the employee organization, provided that amounts equivalent thereto are remitted by the employer to a

charitable organization mutually agreed upon by the employee and the employee organization and failing such agreement then to such charitable organization registered as such under Part I of the *Income Tax Act* (Canada) as may be designated by the Ontario Labour Relations Board.

(3) No agreement shall contain a provision which would require, as a condition of employment, membership in the employee organization.

An excellent review of the authorities is found in the following lengthy excerpt from *York University Re Douglas N. Butler*, [1981] OLRB Rep. Sept. 1319 at para's 11 through 17:

11. The Board in *Helena Wybenga*, [1976] OLRB Rep. Aug. 422 set out the questions which the Board must ask itself about the applicant's beliefs, when considering an application of this kind:

- (a) are they sincerely held;
- (b) are they religious; and
- (c) are they the cause of the objection to paying union dues?

Of these questions, it is often (b) which poses the greatest difficulty. As the Board commented in *Anthony J. Vis*, [1972] OLRB Rep. March 249, at paragraph 9:

9. Second, there is the question of defining a religious conviction or belief. It has been submitted that before the Board can make a determination as to whether an employee has a "religious conviction or belief" it must define "religious". We doubt that we can accomplish this rather herculean task in a manner satisfactory to all. However, there are many cases that do not require an exhaustive definition of "religious" to arrive at a determination. It may be that there are peripheral situations where an applicant's "conviction or belief" must be tested against a definition of "religious" but suffice it to say the applicant in this case does not stand at the periphery of what may be considered to be a "religious conviction or belief". We are satisfied that the applicant would fall within any attempted exhaustive definition of religion that we might make.

The present case, however, does indeed stand at the periphery of what is "religious", and places the Board in the unenviable position of having to pass judgment in that regard.

12. On the basis of the foregoing, counsel for the applicant argues that the beliefs set forth by Dr. Butler are clearly "religious" in nature, and underlie his objection to joining or supporting any trade union. Counsel cites earlier cases of the Board which have indicated that the term "religion" cannot be confined to established sects or churches, but rather can include a set of beliefs personal to one individual. From this, counsel

argues that “personally-held beliefs” are the equivalent of “religion”, and that an applicant need only satisfy the Board that the beliefs underlying his objection are deeply held to bring himself within the exemption provided by section 39. Counsel for the respondent argues that the submission of the applicant eliminates altogether any significance to the word “religious” in the section, and that that word must be taken to have contemplated beliefs which bear at least some relationship to the commonly accepted meaning of “religion” within the community. What the present applicant espouses, in the view of the respondent, is not “religion” but “life-style”, reflecting the same discomfort for having to do things against one’s own will which all individuals, including the applicant, must face from time to time in the course of everyday life.

13. That the term “religion” can have a meaning which extends beyond the established views of a particular sect is now beyond doubt, and has been reflected in numerous decisions of the Courts as well as this Board. See, for example, *The Civil Service Association of Ontario (Inc.) v. Anderson* (1976), 9 O.R. (2d) 341; *Funk v. Manitoba Labour Relations Board* (1976), 76 CLLC ¶14,006; *Klaas Stel v. The North York Civic Employees’ Union, Local 94, Canadian Union of Public Employees*, [1971] OLRB Rep. July 363; *Vis v. Sheraton-Connaught*, [1972] OLRB Rep. March 249; and *Centennial College*, [1979] OLRB Rep. March 174. On the other hand, it is obviously easier for an applicant to demonstrate, and for the Board to find, a particular belief to be “religious” when it forms a part of the dogma of a group or sect both recognized in society and considered to be religious in the traditional sense. It is this distinction which underlay, for example, the vigorous dissent expressed in the *Centennial College* case, *supra*, at paragraph 4. This, however, is largely a question of credibility. As the Board noted in *Klaas Stel*, *supra*, at paragraph 35;

It was argued, however, that Stel’s evidence or affirmation of belief in the witness box must be tested in terms of the consistency and pervasiveness of the belief, particularly where it was not founded on a creed or tenet of faith of a particular church. As we indicated above, we are not persuaded that these are absolute pre-conditions to the establishment of the religious belief, but they may be useful in some cases where there is a credibility issue.

14. Of greater concern to the Board, however, is the applicant’s submission that any deeply-held personal belief is, therefore, essentially “religious” within the meaning of section 39. The Board does not find that its cases have ever extended that far. In *Hogeterp v. UAW v. General Motors*, [1972] OLRB Rep. Feb. 132, on which the applicant relies, the Board stated:

11. However that may be, it is not the religious convictions or beliefs of a certain religious sect that must be determined under section 39 of the Act. The religious conviction or belief on which the objection

must be based is the *personal conviction or belief* of the applicant and accordingly is a subjective matter.

The Board there, however, was simply reaffirming the aforementioned principle that “religion” may be personal to an individual, and need not be tied to an established religious sect. The Board did not say that the belief of the individual need not be “religious” at all. Similarly, in *Stel*, the first case to be decided by the Board under this section, and relied upon as well by the applicant, the Board referred to a number of dictionary definitions of the word “religion”, including:

“related or devoted to the Divine or that which is held to be of ultimate importance” (paragraph 22),

and:

“a *personal set* or institutionalized system of religious attitudes, beliefs and practices” (paragraph 26).

(emphasis from the original)

Once again the Board was simply drawing the distinction between an institutionalized versus a personalized religion, and concluded, at paragraph 26:

In light of all the above considerations, we are unable to conclude that an applicant’s religious conviction or belief must necessarily be founded on a tenet or creed of a particular religious faith.

There is, again, no suggestion that the Board need not still determine whether the belief, be it personal or otherwise, is in essence “religious”. Indeed, both of the definitions referred to make reference to “the Divine”, or to a system of “*religious* attitudes, beliefs and practices”, and the words “that which is held to be of ultimate importance” must, in our view, be read in their context. So as not to misinterpret the decision in *Stel*, it is important to note that the Board in that case had no difficulty relating Mr. Stel’s beliefs to the Divine, and any of the Board’s words *obiter* must be read in the light of this conclusion. As the Board said at paragraph 31:

It seems clear that, based on this testimony or affirmation, Stel objects to joining CUPE because of his religious belief in the sense in which we have earlier defined those words. It is a state of mind that membership in CUPE is inconsistent with his duty to Jesus Christ. There can be little doubt that this relates to the Divine.

15. The Board in *Stel* went on to consider as well the argument that the belief of the applicant was too “secular and selective” to satisfy the meaning of the section. The Board observed:

Counsel's arguments on the secularity and selectivity of the belief are, in reality, addressed to the reasonableness of the belief. Although there may be many who would not understand Stel's belief and while there may be many who would find it unreasonable and would strongly disagree with it, it is not for the Board to substitute its view as to what constitutes a religious belief for that of the individual.

Again, however, while recognizing the individual's right to the subjectivity of his own beliefs, this comment falls short of indicating that the individual's view need not still be found to be "religious". As the Board went on to make clear in the same paragraph:

However unreasonable the belief may appear to some, the evidence impels us to the conclusion that Stel does have this belief and it is one *based on his religion*.

(emphasis added)

16. What the applicant is in effect asking the Board to do is to legislate the word "religious" out of section 39 altogether. This is not an appropriate function for the Board. Compromising between freedom of religion and egalitarian support for a trade union obligated by law to represent all employees in a bargaining unit is a delicate social issue (cf. again *Vis*, *supra*), and falls properly within the purview of the Legislature. Had the Legislature chosen to grant the objection simply on the basis of "personal conviction", or "genuine belief", or "matters of conscience", it could easily have done so. But it did not. The section is not written simply for "conscientious objectors". As the Ontario Court of Appeal observed in *Donald v. Hamilton Board of Education* [1945] 3 D.L.R. 424, in considering the meaning of "religion" under the *Public Schools Act*, at page 429:

The fact that the appellants conscientiously believe the views which they assert is not here in question.

17. The Legislature having chosen to limit the exemption to matters of "religious" conviction or belief, it is the task of the Board to ascribe some weight to that word, and to attempt to distinguish the "religious" from the "non-religious". This becomes particularly cogent if the recently-enacted section 36a, 1980, c.34, s.2(1), requiring the inclusion in a collective agreement, at the request of a trade union, of a provision effectively requiring all members of a bargaining unit to share equally the costs of their agent, is to maintain its integrity. It is the view of the Board that a conviction or belief, to be "religious" within the meaning of the section, must in some way relate to the more orthodox view of "religion" prevalent in the community. That is, the beliefs must relate to the Divine (in some form) and man's perceived relationship to the Divine, rather than to concepts which deal only with man-made institutions, and the relationship of men *inter se*. As the High Court of Australia noted

in *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943), 67 C.L.R. 122, at pages 123 and 124, in defining the statutory limits on freedom of religion:

It is true that in determining what is religious and what is not religious the current application of the word 'religion' must necessarily be taken into account.

This is not to say, of course, that moral precepts may not form an important part of any religion. As the Court observed in *Anderson*, 9 O.R. (2d) 341:

It is trite to say that in some circumstances, or with respect to some individuals, matters of morality might well be quite separate and distinct from matters of religious belief. However, it does not follow that a matter of individual morality and conscience may not for some individuals be an important element or tenet in the religious convictions or belief.

Indeed, it might be argued that religion has no greater importance than in the moral precepts which it imparts, and on the basis of which an individual carries out his daily life. The Board is simply observing that the use of the term "religious" in section 39 appears to require more than merely a code of behaviour or system of worldly standards, standing alone. As *McRuer C.J.H.C.* noted in dealing with the related word, "creed", in *Trenton Construction Workers Association, Local No. 52 v. Tange Company Limited*, 63 CLLC ¶15,459:

Whatever meaning one gives to the word "creed" it must involve a declaration of religious belief. Religious belief, theology and standards of ethical or social conduct are all very different things.

Nor is it sufficient for an applicant simply to state that his worldly standards evolve from his concept of God and God's will. It is the task of the Board to satisfy itself that this is the case.

12. The issue of purported religious views on social, economic and political questions was dealt with by this Board in *Hillel Academy Teachers' Association Re Messaouda Danielle Boulakia*, [1983] OLRB Rep. Jan. 87 at para. 14 in these terms:

In many situations a person of strong beliefs may find difficulty in tracing the source of those beliefs. That is understandable. If one gives any weight to the theory that a person is the product of his upbringing and environment, then clearly a religious person, raised in a religious environment, will tend to attribute the existence of a great many beliefs about the way the World ought to be to his religious convictions or beliefs. But that does not mean that all of his beliefs on social, economic, or political questions are "religious", nor do we suggest that such person is in any way trying to mislead the Board when they are so characterized. It is

only that the individual may have lost a sense of objectivity when scrutinizing his beliefs and (like the Board) have difficulty establishing a clear connection between opinions on social, political, or economic questions (here collective bargaining), and religious principles. Under the Act, however, an applicant must not only be able to convince himself that religious beliefs are the cause of his objection to paying dues, he must also be able to convince the Board of the same thing.

13. These statements of principle are generally relevant to the applicant's position. The applicant admits to a potential overlap between political and religious matters in the context of his faith. Indeed, ambiguity in this respect is inevitable when a religion is tied to the well-being of a nation state. This case turns on our refusal to accept, as the applicant asserts, that in this context "everything is religious". The applicant is clearly a religious person but a religious person is capable of giving a patently unreasonable religious interpretation to an event and thereby assert a personal feeling or political viewpoint. This, we find, has happened in the instant matter. While the resolution is objectionable to the grievor, we must determine whether the claim he asserts against the respondent is religious in nature. In this respect, it is to be noted that the resolution's actual terms contain many views currently proposed by many staunch supporters of Israel. The resolution is thereby not openly provocative and the applicant appeared as much if not more concerned with the press coverage it received as with its contents. Also of significance is the fact that his objection could be withdrawn if OPSEU issued an opposing press release, a fact suggesting a distinctly political motive. Just as important is the applicant's unwillingness to acknowledge that OPSEU itself has no corporate policy dealing with the contents of the resolution and this Board is even unaware of how OPSEU delegates voted on the resolution. In this context, the assertion of an objection against OPSEU carries with it the perception of a non-religious motive – the achievement of opposing press coverage through the actions of the only labour body connected with the OFL over which the applicant has some bargaining leverage. The refusal of the applicant to acknowledge and accept that OPSEU is a member of the CLC which rejected the resolution only adds to this perception.

14. The applicant, however, relies on the *Forer* case, *supra*. During argument the applicant was advised that the *Forer* case was not decided by this Board and was not binding on it. Nevertheless, a decision on the same or a related issue by a sister tribunal can have great persuasive value. Unfortunately, the Ontario Public Service Labour Relations Tribunal did not set out the facts established before it or its reasoning. In the circumstances, and having regard to our reasoning above, we must decline to follow the outcome set out in that decision.

15. We therefore have come to the conclusion that the applicant's stated objections are entirely too remote in relation to the respondent trade union to satisfy the Board that the employee objects to paying contributions or dues because of his religious convictions. The application is dismissed.

0298-83-JD The International Brotherhood of Electrical Workers, Local Union 773, Complainant, v. **Jervis B. Webb Company of Canada, Ltd.**, Respondent, v. United Brotherhood of Carpenters and Joiners of America, Local Union 1244, Intervener, v. The International Association of Bridge, Structural and Ornamental Ironworkers and its Local Union 700, Intervener, v. Spider Installations Ltd., Intervener

Jurisdictional Dispute – Related Employer – Provincial Agreement requiring submission of disputes to IJDB – Employer not bound by agreement but subsidiary bound – Whether employer may rely on related employer provision – Board finding statutory conditions for related employer declaration met – Delay not reason to decline declaration in circumstances – Board not having jurisdiction to inquire into dispute

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members J. Wilson and C. A. Balentine.

APPEARANCES: *Alex Ahee, Doug Ryan and Ralph Terisigni for the complainant; M. D. Contini and W. J. Olsen for the respondent and Spider Installations Ltd.; Lewis Gottheil, Jim Harrower and Stephen Krashinsky for the International Association of Bridge, Structural and Ornamental Ironworkers and its Local Union 700; James Nyman, E. Ryan and H. Martinak for the United Brotherhood of Carpenters and Joiners of America, Local Union 1244.*

DECISION OF THE BOARD; September 28, 1983

1. The name of the respondent is amended to read:
“Jervis B. Webb Company of Canada, Ltd.”

2. This matter arises out of a complaint under section 91 of the *Labour Relations Act* filed by the International Brotherhood of Electrical Workers, Local Union 773 (the “IBEW”). By way of the complaint, the IBEW alleges that Jervis B. Webb of Canada, Ltd. (“Webb”) has wrongfully assigned certain inside construction work to a composite crew comprised of members of the International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 700 (the “ironworkers union”) and the United Brotherhood of Carpenters and Joiners of America (Millwright Division) Local Union 1244 (the “millwrights union”). It is the position of the IBEW that the work should have been assigned to its members.

3. When the complaint came on for hearing on June 6, 1983, Webb, the ironworkers union and the millwrights union all challenged the jurisdiction of the Board to inquire into the matter on the basis of section 91(14) of the Act. This section, which is set out below, prohibits the Board from inquiring into a complaint where a collective agreement contains a provision requiring the reference of any difference arising out of a work assignment to a mutually selected tribunal:

“The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers’ organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as

to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal."

4. It was contended by the other parties, and not challenged by the IBEW, that Webb is bound to both the ironworkers and the millwright provincial agreements and that both of these agreements require that jurisdictional disputes be referred to the Impartial Jurisdictional Disputes Board (the "IJDB"). The IJDB operates pursuant to the plan for the settlement of jurisdictional disputes adopted by the Building and Construction Trades Department of the American Federation of Labour – Congress of Industrial Organizations. Webb and the other two unions contended that the IBEW is bound by a similar provision in article 509 of the IBEW provincial agreement which states as follows:

"509 JURISDICTIONAL DISPUTES

When a work claim dispute arises between the International Brotherhood of Electrical Workers and any other union, person or organization, which cannot be settled to the satisfaction of all parties concerned, such a dispute will not be the subject of a grievance under this Agreement but shall, without any stoppage of work or interference with the progress of the job, be processed by the Union as a complaint in the following manner for resolution:

Any jurisdictional dispute involving the parties to this Agreement concerning inside Construction Work shall be settled in accordance with the Plan for Settlement of Jurisdictional Disputes Nationally and Locally as approved by the Building and Construction Trades Department AFL-CIO or any other plan or method of procedure that may be adopted in future by the Building Construction Trades Department AFL-CIO."

5. The Board recognizes that for some time the IJDB has not been issuing "job decisions", although according to the IJDB all other aspects of the plan for the settlement of jurisdictional disputes is still in effect, and indeed, the President of the IJDB has been issuing directions with respect to the performance of disputed work. See: *Ontario Hydro* [1982] OLRB Rep. Feb. 248 and *Stoney Creek Mechanical Limited* [1982] OLRB Rep. Dec. 1917. In both of these cases the Board ruled that notwithstanding the current difficulties of the IJDB, where parties in their collective agreements have agreed to utilize the IJDB and the plan for the settlement of jurisdictional disputes, section 91(14) prohibits this Board from inquiring into the matter. It is perhaps noteworthy that the current IBEW provincial agreement containing the requirement that jurisdictional disputes be dealt with according to the plan for the settlement of jurisdictional disputes was entered into on May 5, 1982, subsequent to the Board's decision in the *Ontario Hydro* case.

6. At the hearing on June 6, 1983, counsel for the IBEW contended that article 509 of the IBEW provincial agreement and the Board's reasoning in the *Ontario Hydro* and *Stoney Creek Mechanical* cases are not applicable to these proceedings in that Webb has no formal bargaining relationship with the IBEW and accordingly is not bound by the provincial agreement. Counsel acknowledged that a subsidiary of Webb's, Spider Installations Ltd. ("Spider")

is bound to the provincial agreement, but contended that this fact was of no relevance to these proceedings. Counsel for Webb and the other two unions indicated that they were caught by surprise by the contention that Webb was not bound by the provincial agreement. Counsel for Webb requested an adjournment to allow him to inquire into the possible existence of a formal bargaining relationship between Webb and the IBEW. Counsel further indicated that if there was no such formal bargaining relationship, he intended to lead evidence to demonstrate that Webb and Spider are under common direction and control and that pursuant to section 1(4) of the Act the Board should treat them as a single employer and conclude that Webb is in fact bound to the provincial agreement. Both the millwrights and the ironworkers unions agreed that this was an appropriate case in which to apply section 1(4). Section 1(4) reads as follows:

“Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.”

7. When the matter came back for hearing, counsel for Webb agreed with the IBEW's contention that the company had no formal bargaining relationship with the union and, accordingly, indicated that Webb would be relying on the provisions of section 1(4). At that point, counsel for the IBEW objected to the Board even considering the possible application of section 1(4) on the grounds that the section makes no reference to an application being made under the section by an employer. Counsel contended that the purpose of the section is only to assist trade unions. The Board orally rejected this contention. Section 1(4) states that an application can be made under the section by “any person, trade union or council of trade unions concerned”. If the Legislature had desired to limit applications under the section only to trade unions, it would not have also made provision for an application to be made by “any person”. By virtue of the *Interpretation Act*, a “person” can include a “corporation” or other similar legal entity which can act in the capacity of an employer. Accordingly, we are satisfied that Webb, being a corporation and thus, at law, a “person” is entitled to bring an application under section 1(4). We would note that a similar conclusion was reached by the Board in both *Bright Veal Meat Packers Ltd.* [1981] OLRB Rep. March 247 and *Harwill Originals Limited* [1982] OLRB Rep. June 875.

8. Webb is the subsidiary of a large American based firm which designs, manufactures and installs custom engineered conveying systems. Webb, which began its Canadian operations in 1948, is headquartered in the City of Hamilton. Frequently, the installation of Webb's conveyor systems also involves the installation of related electrical systems. Until 1968 Webb's general practice was to directly employ members of the IBEW to do this work while paying them the prevailing union rate. In those cases where Webb for one reason or another felt it could not perform the work, it sub-let the work to unionized electrical contractors. In short, Webb acted as if it was a unionized firm. Notwithstanding this fact, Webb and the IBEW never formally entered into a collective agreement or any form of recognition agreement.

9. In 1968 Webb applied to join the Electrical Contractors Association of Ontario, an

employer trade association which bargained on behalf of its members with the IBEW. Presumably Webb felt that such a move would provide it with some input into the bargaining process. The Electrical Contractors Association, however, made it clear that they were not happy with the prospect of taking a manufacturer such as Webb into membership, but indicated that they would take into membership a subsidiary set up by Webb to perform electrical work. In consequence of this, Webb set up Spider to perform its electrical installation work and Spider was taken into membership by the Electrical Contractors Association. Spider's status as a member of the Electrical Contractors Association was presumably the basis for the Board naming Spider as a firm for which the IBEW had bargaining rights in an accreditation certificate dated September 10, 1975.

10. Apart from four individuals who each own one share, all of the shares of Spider are owned by Webb. The directors of Webb also serve as directors of Spider. The president, secretary, treasurer and controller of Webb all hold the same position with respect to Spider. Mr. R. Rumsey, a vice-president of Webb, is the general manager of both companies and is responsible for Spider's day-to-day operations. Mr. Ian Simpson is responsible for the technical operations of Spider, a function he also performs for Webb.

11. Both Webb and Spider operate out of the same building on Burlington Street in Hamilton. The building is owned by Webb, and the exterior signs display only the name and logo of Webb. Spider pays no rent for its use of the building. All of the tools, equipment and vehicles utilized by Spider are owned by Webb and are maintained by employees of Webb. Any electrical engineering work required by Spider is performed by a member of Webb's engineering staff. All office and clerical work required by Spider is performed by Webb employees.

12. Spider works only for Webb. It does not seek any work from outside contractors. Fully ninety per cent of the electrical work involved with Webb installations in Ontario is performed by Spider. The remaining ten per cent is contracted out to other unionized electrical contractors. When Spider performs work for Webb, the price for the work is simply taken off of the estimates. There are no negotiations about the price.

13. The instant case arises out of the installation by Webb of three conveyor systems at the Chrysler plant in Windsor. Certain electrical installation work on the project was allocated to Spider and to two other electrical contractors employing IBEW members. The work in question, which the IBEW describes as:

“the installation and relocation of limit switch actuators, the installation of conduct support brackets, the installation of secondary support angle iron,”

was apparently viewed by Webb as not being part of the electrical installation work and, accordingly, not part of the work given to either Spider or the other two electrical contractors. It is the contention of the IBEW that the ironworkers and millwrights who are performing the work are direct employees of Webb, and accordingly, it was against Webb that it filed the section 91 complaint seeking an award of the work.

14. It is clear on the evidence that Spider and Webb are in fact under common direction and control, and that since 1968 Spider has been performing work previously performed by

Webb. It is also apparent that Spider functions essentially as the electrical contracting division of Webb. It is of some interest that the IBEW has itself regarded Spider only as a division of Webb. Indeed, in a letter to Webb dated April 29, 1983, concerning the work now in dispute, Mr. Doug Ryan, the business manager of Local 773 of the IBEW, commented as follows:

“As mentioned in the minutes you have awarded the installation of the limit switch actuators and any additional adjustments requiring relocation of the actuators to a composite crew of Millrights and Ironworkers. I must once again inform you of my strong objection and again feel that your decision was based on the fact that because *your electrical division Spider Electric* will not be performing the electrical work on this project and due to the fact of your 50/50 arrangement with the Ironworkers/Millrights it is economically advantageous to keep the limit switch actuators in your own Mechanical package. I wish to once again bring to your attention that on both the Essex Engine (Ford Motor Project 1979-80) and the General Motors (Transmission Project 1979-80) your company awarded the installation of the Limit Switch actuators and there adjustment to the I.B.E.W. L.U. 773. This fact will be born out by your Mr. Jim Douglas and Mr. Charles Harrison of *your electrical division Spider Electric*.”

(emphasis added)

15. On the evidence before us, we are satisfied that the statutory pre-conditions have been met for the Board to make a 1(4) declaration declaring Webb and Spider to be a single employer. The act, however, indicates that even where the statutory preconditions have been met, the Board retains a discretion not to make a section 1(4) declaration. The IBEW contends that this is the type of case where the Board should exercise its discretion and not make the declaration. This contention is based, in part, on the submission that Webb could have brought the application as long ago as 1968, and that the delay involved has simply become too great. Delay in bringing a section 1(4) application has in a number of cases been viewed by the Board as an appropriate basis for not granting a common employer declaration. These cases have generally involved situations where a union had accepted the existence of related union and non-union operations for a lengthy period of time before seeking by way of a 1(4) application to bind the non-union operation to a collective agreement with the union operation. However, delay will not always bar a union from bringing a section 1(4) application. For example, in the *M. J. Guthrie Construction Limited* case [1982] OLRB Rep. Sept. 1332, related union and non-union operations had existed side-by-side for some twenty years, but recently the employer had begun to transfer work traditionally performed by the union operation to the non-union one. The Board in that case applied section 1(4) so as to protect the union's bargaining rights from this new threat. In applying the same type of reasoning to the relationship between Webb and Spider, it is perhaps safe to assume that had Webb recently begun to contract out work to a non-union electrical contractor, or to directly hire non-union electricians and employ them without regard to the terms of the provincial agreement, notwithstanding the passage of time since 1968, the Board would have been prepared to protect the union's bargaining rights by finding Webb and Spider to be a single employer and by declaring Webb to be bound to the provincial agreement. In the instant case, it was only during these proceedings that the IBEW for the first time contended that it viewed Webb and Spider as being other than an integrated unionized enterprise. Webb immediately responded to the IBEW's

contention by requesting a declaration under section 1(4). In our view, the facts present here do not support a conclusion that there has been the type of delay that should result in a section 1(4) declaration not being given.

16. The IBEW contends that it would be inappropriate for the Board to make a section 1(4) declaration in that Webb has been building control panels in its shop without employing members of the IBEW. The union does not contend that Webb's shop employees would fall under the provincial agreement, but instead notes that Webb could have signed a "shop agreement" to cover the employees involved. Mr. Rumsey, the general manager of Webb, acknowledged that Webb does construct control panels in its shop in Hamilton using non-IBEW members. Mr. Rumsey testified that at one point in time the IBEW considered organizing the plant employees, but decided against it because there were only four of them. Mr. Rumsey stated that on certain projects the IBEW insisted that the control panels be built "in the field", in consequence of which field shops employing IBEW members were set up to make the panels. There is no dispute but that on the Chrysler project, IBEW members have been installing panels built by non-IBEW employees of Webb. There is nothing in the evidence to indicate that the IBEW had raised any objection to its members installing the panels.

17. The IBEW's position concerning the panels was explained by Mr. Ryan, Local 773's business manager. Mr. Ryan testified that in the Windsor area there are several shops which make electrical control boxes signed to agreements with Local 773. According to Mr. Ryan, if Webb employees (as opposed to employees of Spider) had been installing the panels, he would have insisted that Webb sign a shop agreement. Mr. Ryan indicated that he felt he would have been within his rights to insist that Webb sign such an agreement because of the sub-contracting clause in the provincial agreement. (It might be noted that counsel for Webb indicated that he did not agree with Mr. Ryan's interpretation of the relevant sub-contracting clause, and also queried how Mr. Ryan's local in the Windsor area could insist that Webb sign a collective agreement covering non-construction employees in Hamilton.) In his final submissions, counsel for the IBEW contended that the only reason Webb had not been required to sign a shop agreement for its panel manufacturing operation was because Spider employees had been installing the panels. Accordingly, he contended, Webb is now estopped from claiming to be bound by the IBEW provincial agreement.

18. We do not feel that the shop issue is one which would justify not granting a section 1(4) declaration. The shop employees of Webb do not, and would not, fall under the provincial agreement. Accordingly, the shop employees would not be directly affected by any section 1(4) declaration. As for the claimed estoppel, there appears not to have been either any holding out on the part of Webb or the type of detrimental reliance on the part of the IBEW that is necessary for the principle of estoppel to apply. If as a result of a 1(4) declaration the IBEW feels its position will be improved vis-a-vis Webb's shop employees in Hamilton, that is a matter that the union can follow up on. In the circumstances, however, we do not view it as a basis for refusing to make the requested 1(4) declaration.

19. We are satisfied this is an appropriate case in which to grant the requested 1(4) declaration. Spider and Webb are engaged in a single integrated operation in which Spider operates essentially as a division of Webb. Prior to 1968 Webb employed IBEW members directly, and since that date it has employed IBEW members through Spider. Any electrical work required to be contracted out has been contracted out by Webb to IBEW contractors. In these circumstances, the IBEW's claim that Webb is somehow distinct from Spider rings

hollow. In our view, a 1(4) declaration would serve to bring the “form” of the relationship between Webb and the IBEW into conformity with the existing reality.

20. Having regard to the above, the Board is of the opinion that the preconditions for the application of section 1(4) have been made out, and accordingly, the Board will treat Spider and Webb as constituting one employer for the purposes of the Act. The Board further declares that Webb is bound by the terms of the IBEW provincial agreement. In these circumstances, the Board is satisfied that in accordance with section 91(14) of the *Labour Relations Act* the jurisdictional dispute in issue is not one that should be dealt with by this Board, but rather, it should be dealt with in accordance with article 509 of the IBEW provincial agreement.

21. The complaint is accordingly dismissed.

1113-83-R The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen – Local #12, Applicant, v. **City of Kitchener**, Respondent, v. Canadian Union of Public Employees, Intervener

Certification – Construction Industry – Practice and Procedure – Employer constructing and altering its buildings on own behalf – Whether operating business in construction industry – employees spending majority of time as bricklayers employed as bricklayers – Work performed as bricklayers construction and not maintenance work – Challenge to union’s craft status raised at hearing for first time not entertained

BEFORE: R. A. Furness, Vice-Chairman and Board Members C. A. Ballentine and J. Wilson.

APPEARANCES: *S. B. D. Wahl and Marcel Secours for the applicant; John P. Sanderson, Q.C. And Gail White for the respondent; Beryl A. M. Cote and Jim Anderson for the intervener.*

DECISION OF THE BOARD; September 30, 1983

1. The applicant applied for certification under the construction industry provisions of the *Labour Relations Act* with respect to two bricklayers who were employed by the respondent on August 23, 1983. The Canadian Union of Public Employees intervened to protect its bargaining rights with respect to certain other employees of the respondent. The clarity note with respect to the bargaining unit set forth in paragraph thirteen serves to take note of the bargaining rights of the intervener.

2. In its reply the respondent stated that (a) the application should be dismissed because it is not an employer within the meaning of section 117(c) of the Act, (b) it does not employ bricklayers or their apprentices, (c) the two persons who appear to be concerned with this application are maintenance employees of the respondent and have been so classified and paid under the provisions of the subsisting collective agreement between the respondent and

The Kitchener Civic Employees' Union Local #68 of the intervener and (d) at all times and for all purposes these employees along with all other maintenance employees of the respondent have been covered by and subject to the collective agreement. It was the position of the applicant and the intervener that the collective agreement does not cover work in the construction industry.

3. It was agreed that the two employees affected by this application are Robert Tavenor and Eugene Savage. Mr. Tavenor and Mr. Savage were hired by the respondent on May 9 and April 21, 1983, respectively. On August 23, 1983, the date of the making of this application, Mr. Tavenor was working at the respondent's Victoria Park Boat House and Mr. Savage was working at the respondent's arena-auditorium. Mr. Tavenor and Mr. Savage were employed under a scheme initiated by the Federal Government whereby capital improvements were to be made to public edifices. Mr. Tavenor spent approximately seventy per cent of his time laying bricks and blocks, he also washed bricks and mixed his own mortar. The boat-house was substantially gutted and Mr. Tavenor built interior block partitions. Mr. Savage spent approximately seventy-five per cent of his time working on an addition to the arena-auditorium where footings were poured, and he built a concrete wall four feet in height. A brand new roof was built on the extension to the building. In addition, Mr. Savage was engaged in altering entrances within the existing arena-auditorium.

4. The respondent characterized the work of Messrs. Tavenor and Savage as being maintenance work and not as construction work. The applicant regarded the work as construction work and not as maintenance work. All of the parties agreed that when Messrs. Tavenor and Savage do perform maintenance work it is covered by the collective agreement between the respondent and the The Kitchener Civic Employees' Union Local #68.

5. Messrs. Tavenor and Savage spent the majority of their time on the date of the making of this application performing the work of bricklayers. Where, in the construction industry, employees engage in work of different crafts and are paid only one rate, the Board characterizes the craft in which they are employed for a majority of their time as the one governing their status in an application for certification. (See *O. J. Gaffney Limited*, [1964] OLRB Rep. Aug. 233.) The Board finds that Messrs. Tavenor and Savage were employed on the date of the making of this application as bricklayers.

6. The work performed by Messrs. Tavenor and Savage involved constructing and altering buildings or structures at the site thereof. Section 1(1)(f) of the *Labour Relations Act* defines "construction industry" as:

"construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof."

The work performed by Messrs. Tavenor and Savage as bricklayers falls within the definition of "construction industry" in section 1(1)(f) and the Board accordingly finds that they were engaged in performing work in the construction industry and were not engaged in performing maintenance work.

7. The respondent argued that it is not an employer within the meaning of section 117(c) of the Act. Section 117(c) provides:

117. In this section and in sections 118 to 136,

• • • •

- (c) “employer” means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof.

In this application for certification the evidence clearly reveals that the respondent has carried out a programme of constructing and altering buildings and structures on its own behalf. The Board has considered the issue raised by the respondent on many occasions. Most recently, the Board stated in *The Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62 at pages 70-71 as follows:

33. The Board has previously considered the meaning to be given to section 106(c) [now section 117(c)] of the Act. In the *Tops Marina Motor Hotel* case, 64 CLLC ¶16,004, a registered partnership consisting of an investor, a salesman, a lawyer and a builder was formed for the purpose of building and operating a motor hotel. This was the first venture of the partnership. The Board found that the work which was being performed fell within the definition of construction industry in section 1(1)(da) [now section 1(1)(f)] of the Act and that the partnership was the employer of the carpenters who were affected by the application. The Board rejected a contention that in order to operate a business in the construction industry the construction work must be for persons other than those engaged in the work and stated that it was not disposed to place such a general restriction on the word “business”. The Board also considered whether the primary or predominant purpose of the operation ought to be the test under section 90(a) [now expressed in section 117(c)] of the Act and stated at page 645:

“This brings the Board to counsel’s second argument that the primary or predominant purpose of the operation ought to be the test. The legislation does not use this language, and if that had been the intention of the Legislature, it would have been a simple matter to have said ‘employer means a person who operates a business primarily in the construction industry’ or some similar wording. Furthermore, it seems to the Board that an employer whose primary business is that of manufacturing but who in addition to selling his products to others, operates a construction division for the purpose of erecting his product at a construction work site, would be excluded automatically from the definition if the test suggested by counsel were to be adopted. Again, the Board is not disposed at the

present time to place such a general restriction on the word 'business' as it appears in the section.

There remains for consideration, however, the question as to whether the respondent is operating a business in the construction industry. As has already been noted, the respondent's sole activity at the present time is that of constructing a building. In that sense therefore, its present and sole 'profession', 'trade', 'employment', 'engagement', or 'occupation' (to take some of the meanings of the word 'business') is construction work. However, assuming the present intentions of the partnership are carried through to fulfilment, the partnership will then be engaged in the operation of a motor hotel and in the construction of a second motor hotel. If this turns out to be the case, then in the Board's view the respondent's 'profession', 'trade', 'employment', 'engagement', or 'occupation' is that of building and operating motor hotels. While it may be that in the long run the respondent will be occupied more with operation than with building, the construction activity is an important and concrete part of its objects. Thus it appears to the Board that whether attention is focused only on the respondent's present activity or on its present activities and future plans, the respondent is operating a business, perhaps not its main business, but nevertheless a business in the construction industry within the meaning of the *Labour Relations Act*."

34. In the instant application the respondent, far from being engaged intermittently in undertaking the work which is being performed by the temporary carpenters, is regularly and continuously engaged in such work. Moreover, while the dollar volume of such work is small in comparison to the construction work which is performed on a tender basis, the dollar volume of such work performed by the carpenters exceeds the dollar volume of many employers who work solely in the construction industry. In addition, the respondent employs more trades than many employers in the construction industry. As the Board stated in the *Tops Marina Motor Hotel* case, *supra*, it is not necessary that the business of an employer in the construction industry is the predominant or primary business. The soundness of that position has become clear over the years when the Board considers the number of large construction projects which have been accomplished by owner-builders and developers. In addition, as the Board stated in the *Kapuskasing Board of Education* case, 72 CLLC ¶16,057, there is no requirement that in order to operate a business an operator of such business must necessarily carry on such venture with a view to making a profit. See also *Canada Labour Relations Board et al. v. City of Yellowknife*, (1977) 76 D.L.R. (3d) 85. Similarly, in *The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor* case, [1966] OLRB Rep. March 920, this Board, in a proceeding under section 47a [now section 63] of the Act, stated at page 922:

"In the instant case, the term 'business' should be given that inter-

pretation most consistent with the other provisions of the *Labour Relations Act* and which will best effect the purposes of that section of the Act in which the term appears. It should be borne in mind that the Act does not distinguish between public and private business, and contemplates the existence of bargaining rights held by trade unions with respect to 'employers' generally and not simply those engaged in commercial enterprises. Nothing in the Act would suggest that any limitation on the continuance of these bargaining rights should be imposed by virtue of the non-commercial nature of any employer's; 'business'. The term 'business' as it appears in the *Labour Relations Act*, therefore, ought not to be qualified by the addition of the adjective 'commercial', but should rather be read as referring generally to the *undertaking* of any employer whose operations are subject to this Act."

8. In this application the respondent has consciously performed construction work using bricklayers and in so doing has briefly engaged in a business in the construction industry. The respondent's primary business is municipal government. However, as the Board stated in *Tops Marina Motor Hotel, supra*, it is not necessary that the business of an employer in the construction industry is the predominant or primary business. The Board finds that the respondent is operating a business in the construction industry within the meaning of section 117(c) at the relevant time under the *Labour Relations Act*.

9. The respondent classified Messrs. Tavenor and Savage as "Maintenance III" and paid them the rate provided for in the collective agreement between the respondent and The Kitchener Civic Employees' Union Local #68. Moreover, the respondent deducted union dues under a compulsory check-off under that collective agreement. The recognition clause in that collective agreement covers all employees save and except arena managers and assistant managers in the Parks and Recreation Department, foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation or university term period. The respondent informed the Board that the collective agreement covered an "outside" bargaining unit of employees. The classifications under the collective agreement certainly reflect this and, of course, include three classes of maintenance employees. It was agreed that the collective agreement covered maintenance work. On a fair reading of the collective agreement, the Board finds that it does not cover employees engaged in construction work. The fact that a rate has been paid and dues deducted under the collective agreement does not in itself establish that the employees in question are covered by the collective agreement. (See *Ecodyne Limited*, [1979] OLRB Rep. July 629.)

10. During argument the respondent raised for the first time whether the applicant is a trade union that according to established trade union practice pertains to the skills or craft of bricklayers. The applicant objected to the respondent making and the Board entertaining such an issue for the first time in argument. The respondent never raised the status of the applicant under section 6(3) of the Act either in its reply or during representations on the appropriate bargaining unit. Neither the applicant nor the Board was aware that there was any question concerning the status of the applicant as a trade union able to bring itself within the provisions of section 6(3). In the circumstances, the issue was not raised by the respondent

in a fair and timely manner and the Board is not prepared to entertain such an issue when it is raised in this manner.

• • • •

[Paragraphs 11-15 finding union status, bargaining unit etc. omitted]

16. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(emphasis added)

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 11 above in respect of all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

17. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

0747-83-U Liberato Petti, Herbert Clark, et al, Complainants, v. United Steelworkers of America, Respondent, v. **Lilo Rail of Canada Limited** and Modern Plating Limited, v. Interveners.

Duty of Fair Representation – Ratification and Strike Vote – Unfair Labour Practice – Union recommending acceptance of employer offer – Form of ballot giving members choice between ratification and strike – Choice given informed and realistic in circumstances – Not unfair representation – No intimidation during vote – Notice of vote addressed to “members” of union – Agenda indicating “vote on tentative contract” with no reference to strike – No evidence of employees denied opportunity to vote due to defective notice – Complaint dismissed

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. W. Murray and W. F. Rutherford.

APPEARANCES: *William S. Challis and George Biesma for the complainants; Keith Oleksiuk, George Teal and Brian Shell for the respondent; D. Jane Forbes-Roberts and Don Blake for the interveners.*

DECISION OF THE BOARD; September 15, 1983

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging a violation of sections 68, 70 and 72 of the Act. While a good deal of evidence was called on the complaint, the issues are straightforward, and can essentially be decided on the basis of matters not in dispute.

2. The respondent trade union was certified in the summer of 1982 to represent the employees of Lilo Rail of Canada Limited and Modern Plating Limited, the intervener/employer. The respondent served notice to bargain in August, and bargaining continued until the end of 1982. At that point the employer indicated to the union negotiating committee that it had put out everything that it had, and the parties signed a Memorandum of Settlement, subject to ratification. The union then summoned the employees to a ratification meeting with the following notice:

SPECIAL

MEMBERSHIP MEETING

TO: All Members of United Steelworkers of America at Lilo Rail and Modern Plating Company Limited

DATE THURSDAY, January 27th, 1982

TIME 4.40 p.m.

PLACE Employees' Lunch room at Lilo-Rail

AGENDA Discussion, and a *VOTE* will be taken on a tentative agreement

WE URGE ALL MEMBERS TO ATTEND THIS IMPORTANT
MEETING !

On behalf of the Negotiating Committee,

GEORGE TEAL

Staff Representative

At the meeting the company's offer was explained to the employees. It provided for a two-year agreement, with a 30¢ increase in the first year, and a further increase in the second. The effective date of the contract was to be January 1, 1983 (the notice of the meeting presumably should have read: "January 27th, 1983"), and the wage increase was to be retroactive to that date. Employees were given the choice to accept or reject the company's offer, and they voted 41-15 in favour of rejection. The union then told the employees that it would go back to the bargaining table to see what it could do, but made no promises.

3. When the union did try to resume bargaining, it found that the company was refusing to bargain because of certain charges which the company had by then filed with the Ontario Labour Relations Board, relating back to the union's initial certification. That suspended matters until May of 1983, when the Board rendered its decision dismissing the charges. Mr. Teal, the union representative in charge of negotiations for this unit, then contacted the conciliation officer who had been assisting the parties, and indicated his desire to resume bargaining. The conciliation officer arranged a meeting for June 17th, and the parties apparently met across the table. The company negotiator indicated that the company "wouldn't change a period" on its prior offer, and that the union had seen the company's final offer. The company's president as well conveyed to the union that the company was in serious financial difficulty, having lost a number of orders in the past several months, and that there was no possibility of it improving on its previous offer. The company negotiator also indicated that the contract and wage increase would now be effective upon ratification. Mr. Teal prevailed upon the company to enter into a certain degree of negotiation on these latter points, with the result that the company ultimately agreed to the contract remaining effective from January 1, 1983 (which would bring the parties back to the bargaining table a little sooner) and retroactivity of two months to May 1st. Mr. Teal and his employee committee at that point left the room to caucus on their own, and, knowing that the company was in fact in financial difficulty, decided to take the company at its word when it indicated that this was indeed its final offer. They accordingly decided that they had no alternative but to accept the offer, and agreed to recommend it to the bargaining unit. Again, a notice was distributed of the ratification meeting, in the identical terms to the notice of January. A new date and time were shown, and the location, instead of being in the employees' lunch room, was at the Steelworkers hall in Brampton. At the meeting Mr. Teal, with the help of an Italian interpreter from the union, explained to the employees the terms of the company's "new" offer, and the reasons why the bargaining committee had agreed to recommend it. The employees, however, quickly recognized that the offer over the two-year period was in fact an inferior one compared to the offer they had rejected in January, since the effective date of the first increase had now gone from January to May. The meeting accordingly became quickly unruly. Mr. Teal then began to explain the form of ballot that he had selected for the vote. On this occasion it was not simply the accept/reject form of ballot that the employees had seen in January. Rather, Mr. Teal had decided that bargaining had reached the point where the employees

had to vote either to accept the company's final offer, or to authorize a strike. When employees began to realize the thrust of the ballot through the Italian interpreter, a number of questions began to come forward from the floor. The substance of the employees' remarks was that they did not like the contract, but they also did not like the idea of going on strike. They accordingly argued with Mr. Teal that he ought to split the ballot into two questions, and let the employees vote first on the contract, and then on the question of a strike. Mr. Teal responded that would be a waste of time, and that he was not going back to the bargaining table without a strike vote. He stated that he was not prepared to change the form of the ballot. At that point, one employee, a Mr. DeMarco, said: "Well, if you're not going to change the ballot, we're not going to vote", and shouted to the rest of the employees to leave the room. Another employee, Mr. Clark, who had earlier been one of the most vociferous in decrying the terms of the recommended settlement, also, according to Mr. Teal, began shouting: "Leave the room, leave the room". Mr. Teal urged all of the employees to participate in the voting, but also said that any employees who did not wish to vote, should leave the room. The objectors, like Mr. Clark, apparently refused to leave the room at that point, and instead continued to interfere with Mr. Teal's attempt to run the meeting. At this stage Mr. Teal admits to having been "upset at least to a degree", and began to march down the hall toward Mr. Clark, whom he had identified as the main agitator at that point. Mr. Clark testified that Mr. Teal grabbed him by the front of the shirt (Mr. Teal testified that he put his hand on Mr. Clark's shoulder) and told him to get out if he wasn't going to vote. Mr. Clark told Mr. Teal to take his hands off him, and Mr. Teal did so. Mr. Teal then told Mr. Clark that he'd asked him to leave twice, and that if he did not do so immediately, Mr. Teal would call the police. Mr. Clark then turned and left the room. Another employee, Florence Constantino, testified that Mr. Teal pushed her on his way to Mr. Clark, but Mr. Teal indicated no recollection of this incident. Ms. Constantino essentially corroborated Mr. Clark's version of how Mr. Teal grabbed him, as did other employees who testified. Ms. Constantino was asked if she was still in the room at the time the incident between Mr. Teal and Mr. Clark occurred, and her answer was that "we were all about to walk out at that point, but yes, I was still in the room when Mr. Teal came down to Mr. Clark".

4. There are some 55 employees in the bargaining unit, and it appears that approximately 45 were in attendance initially at the meeting. Only 10, however, remained to cast their ballot, the remainder having removed themselves to the hallway outside of the meeting room. Before closing the polls, Mr. Teal went out into the hallway and again urged the employees to come inside and exercise their franchise. Mr. Teal waited a few minutes but no further employees came in to vote. He then closed the polls, and tabulated the ballots. He asked for a volunteer amongst the employees in the hallway to come inside and verify the count, and a Mr. Biesma agreed to do so. The count showed 8 employees in favour of the company's final offer, and 2 in favour of strike action. The respondent is accordingly prepared to enter into a collective agreement with the employer.

5. Mr. Teal was cross-examined extensively on his choice of ballot. He explained that he had used the simple accept/reject form of ballot back in January, because at that point he was not one hundred per cent satisfied that they had reached the end of bargaining. Neither had he made arrangements with the conciliation officer at that point to issue a "No-Board" report if the contract failed to be ratified. By June, however, he sensed that the situation was different. The message was clear, from the company itself as well as through the conciliation officer, that this was the company's "final offer", and Mr. Teal believed that. Both parties agreed that the countdown would begin towards the strike/lockout deadline if the contract was

not accepted by the employees. Mr. Teal actually received legal advice from the Steelworkers head office, to the effect that he was within his rights to simply sign the contract without putting it to a vote if he felt that was the best the employees were going to be able to do, but Mr. Teal felt strongly that it was the prerogative of the employees to make the choice. When he began to explain the form of ballot at the meeting, he was well aware that some of the employees in the room were not happy with the “hard” choice that they were being given. It was Mr. Teal’s view, however, as he explained at the meeting, that after you’ve given it your best shot, there comes a time when bargaining has to end. Mr. Teal made it plain to the employees that he was not going to waste everyone’s time by going back to the company for more, unless the employees were prepared to give him a strike mandate. He acknowledged that he himself was not particularly pleased with what the union had been able to obtain in the contract, but that it did at least provide for some raises and benefit improvements, and provided a base to bargain upon the next time. Had he agreed as asked to split the ballot, and got both a contract rejection and a strike rejection, where, he queried in cross-examination, was the union supposed to go from there? This realistic assessment of the situation stands in contrast to the approach of some of the leading spokesmen for the complainants. Mr. Biesma, for example, when asked what it was he expected the union to do if the employees did not want the contract but also did not want a strike, suggested that the union should simply go back to the company and ask for more.

6. Counsel for the complainants argues, firstly, that *any* use of the ratify/strike form of ballot employed in this case is a violation of the duty of fair representation, because it precludes the employees in the bargaining unit from expressing their “true wishes” on each of these two questions individually. Counsel conceded that, absent anything in the union’s constitution, the union is not required to take a vote of its members on a proposed contract. Compare *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421, at paragraph 15. But once it purports to do so, counsel argues, the trade union must do so in a way that is “meaningful”, and not a mere “sham”. And if it is not an offence to use this form of ballot in every case, counsel argues, it is at least an offence to do so when the trade union has clear indications that a significant number of the employees are in favour of neither the contract nor a strike. Counsel argues that Mr. Teal should have governed himself by analogy with the “fair and democratic” procedures for dealing with new matters at local union meetings (which this was not), and should have allowed a motion and debate on the question of changing the form of ballot. Counsel also suggested in this case that Mr. Teal was anxious to have the contract accepted, in order to protect the union’s bargaining rights, and accordingly chose a form of ballot which was most likely to produce that result.

7. The issue is not dissimilar from that before the Board in *K-Mart*, *supra*. There the company’s offer had been rejected by the bargaining unit, but on the resumption of bargaining, the company made it plain that that was its “final offer” and, being aware of the lack of support for a strike, stated that it had no intention of making any improvements. The union then decided to recommend the contract as the best that could be obtained in the circumstances, and put the offer back to the members for a second vote. At the ratification meeting were a large number of employees openly hostile to the union’s bargaining rights, and the contract was turned down by a margin of 67-68. The union recognized that it did not have the strength to call a strike, and so exercised its prerogative under its constitution to sign the contract, in spite of the negative vote. A group of dissident employees complained to the Board that the union’s duty of fair representation had been breached. The complainants made many

of the same arguments that were put to the Board in the present case, and the Board was firm in rejecting all of them. The Board discussed the critical points as follows:

33. It is argued by the complainants that the union's conduct was "un-democratic" and thus contrary to section 60 [now 68]. There are several answers to this submission. First the Act does not purport to regulate internal union democracy per se – perhaps in recognition of the fact that a union is a "fighting organization" and may have its effectiveness as a collective bargaining mechanism impaired if its officers were regarded as "delegates" rather than "representatives" of the employees in the union. Secondly, the reference to democracy is not really very helpful. Not only does it ignore the special collective bargaining context but even in "democratic" institutions such as the Legislature or Parliament, once representatives are elected they are left to vote as they wish or enact laws even though a majority of their constituents may not agree with their position. The remedy is at the ballot box, or in the present context, through a termination application. In determining whether there has been a breach of section 60 [now 68] in the instant case, we have found it more helpful to ask what the union could/should have done? What were its options?

In line with those latter questions, the Board observed:

35. We do not think that the union was required to resume futile bargaining, engage in an unpopular and abortive strike, or walk away from its bargaining rights, for, to hold that it was required to adopt any of these options would be to say either that it must participate in a pointless charade, and engage in an exercise in self-destruction, or that the repudiation of the employer's offer should be construed (as Mr. Bhatia did) as an effective termination of its bargaining rights. We are not prepared to make such finding. There is no doubt that the union carefully considered the options open to it, and weighed all of the circumstances – including the collective bargaining reality of the situation, the terms of its constitution, and the motivation of its opponents.

8. In a more general vein, it is significant to note that the Board in *K-Mart* specifically approved of the following statement in an earlier decision of the Board in *Diamond Z Employees Association*, [1975] OLRB Rep. Oct. 791, at paragraph 13:

... We are of the view that the representative trade union despite its obligation to employees in complying with the duty of fair representation must necessarily have "a free hand" in setting strategies that will best forward employees' interests irrespective of their expectations. (See: *The Nicholas E. Erdely* case, OLRB M. R. September 1972 – 844).

This is really the nub of the matter at hand. While the Board in such cases as *Corporation of Thunder Bay*, [1983] OLRB Rep. May 781, and *Dufferin Aggregates Limited*, [1982] OLRB Rep. Jan. 35, makes it clear that the duty of fair representation applies at the negotiation stage of collective bargaining as well as administration, those cases deal with the manner in which the trade union carries out the balancing of disparate interests within the bargaining unit. The

trade union is, nonetheless, the “bargaining agent”, and in fact under our Act the *exclusive* bargaining agent, so that matters of bargaining strategy, in dealing with the employer vis-à-vis the bargaining unit as a whole, generally fall within its domain of both prerogative and responsibility. Counsel for the complainants argued that Mr. Teal in his testimony offered essentially no explanation for his refusal to split the ballot as requested, other than to say that it was not his policy to change the form of the ratification ballot simply because an employee or employees demand it, and to assert his theory that bargaining must at some point be brought to a head. The Board, on the contrary, finds this to be a perfectly acceptable response by Mr. Teal to the questions which the complainants have raised. Mr. Teal clearly had turned his mind to the point to which bargaining had come, and was only assessing the “collective bargaining reality”, as the Board in *K-Mart, supra*, put it, in deciding that no further purpose could be served by returning to the bargaining table, unless it was with a strike mandate from the employees. That may not have been as easy a choice as some of the employees would have liked Mr. Teal to have put to them, but it is a fair and realistic appraisal of where the situation stood. The “sham” in the circumstances would have been to have gone through the ritual of another two-part ballot, with the results essentially predictable, and the value, in terms of advancing the situation, to have been nil. Mr. Teal was not required, as counsel for the complainants suggests, to permit a negative vote on both questions, and then to choose between going back to the bargaining table without any additional leverage, and calling a strike in the face of an express vote showing it would not be supported. Neither was Mr. Teal required to allow the bargaining, and hence the union’s bargaining rights, to dangle in limbo, and become subject to a termination application by employees disgruntled with the lack of a contract, or an argument of abandonment by the employer. The choice which Mr. Teal accordingly put to employees was an informed and realistic one, and one which the respondent, in its capacity as bargaining agent, was entitled to dictate.

9. And because Mr. Teal was entitled to insist on the form of ballot which, in his judgment, he considered appropriate, he was also entitled to ask those employees who did not wish to participate in the voting process to leave the hall, and not interfere further in the running of the meeting. It is essentially common ground in the evidence that Mr. Teal extended numerous and unequivocal invitations to all the employees at the meeting to stay and vote. Ms. Rousal, the final witness for the complainants, was able to remember very little, but she remembered *that* without hesitation. That Mr. Teal became upset with the manner in which various employees were refusing to either participate or leave the meeting is not surprising or unreasonable in the circumstances. Although he may have lost control at the point where he actually laid his hands on Mr. Clark, this momentary flare-up could not in any way be said to have “intimidated” or “coerced” anyone, as argued, from staying and exercising their rights under the Act if they had wished. On the contrary, as one of the complainants, Ms. Constantino, herself testified, the incident between Mr. Teal and Mr. Clark occurred “just as we were about to leave” anyway, and that is precisely the sense that the Board gets from the overall evidence. The complaint under sections 68 and 70 is accordingly dismissed.

10. That leaves the complaint under section 72 of the Act. The material portions of section 72 read as follows:

72.-(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

(5) All employees in a bargaining unit, whether or not such employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

(6) Any vote mentioned in subsection (4) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

The complainants argue that the respondent has failed to comply with these subsections in a number of respects. Firstly, counsel argues that the use of the word “or” between “a strike vote” and “a vote to ratify a proposed collective agreement” is meant to indicate that the two votes could never be taken in one and the same ballot. The Board does not agree. The use by trade unions in appropriate circumstances of a ratify/strike form of ballot has a long history and, as discussed above, an important labour relations purpose in this province. In the Board’s view, had the Legislature meant to effect such a fundamental change in the practice and prerogatives of trade unions, it would have done so expressly. There will, of course, continue to be many situations in which the trade union will elect *not* to combine the two questions (as occurred in the first ratification vote in this very case), and the use of the disjunctive continues to have meaning in contemplation of that possibility. Counsel cites in support of his argument a decision of the British Columbia Labour Relations Board in *Metal Industries Association and Letson and Burpee Limited*, [1977] Can. L.R.B.R. 151, where that Board, commenting on a provision of its own Act calling for a secret ballot prior to the calling of a lockout in multiple-employer bargaining, noted that: “The ballot should pose the question in a fair manner”. That comment, as a reading of the sister case reported in [1977] 3 Can. L.R.B.R. 101 makes clear, was in reference to the complaint that the question on the ballot in that case was *ambiguous*. Clearly it is not an argument that can be made in the present case: the employees who protested were only too aware exactly what it was they were being asked to vote upon. Once again, we feel that if the Legislature had intended to insulate employees from the kind of “hard choice” presented by this form of ballot, it would have dealt with the matter expressly.

11. Of more concern to the Board are the complainants’ arguments centering on the heading on the Notice of the ratification meeting, together with the manner of describing the proposed subject matter of that meeting.

12. On its face the Notice was addressed, once again,

“TO: All Members of United Steelworkers of America at Lilo Rail and Modern Plating Company Limited”

Given that the express purpose of subsection (5) (which counsel for the respondent duly noted was incorporated into the Act at the same time as the dues deduction provisions of now section 43) was to ensure that both members and non-members of the trade union be permitted to participate in the vote, the Board has to be more than a little concerned at the lack of attention given to this matter by the respondent in the drafting of its Notice. There is, of course, a difference between being required by law to pay dues, and being a “member” of a trade union, and again between being a “member” of the trade union, and being a “member” of the bargaining unit. Mr. Teal testified that in his view, “everyone in the bargaining

unit" were his "members". But this explanation, which we accept as *bona fide*, is of little comfort in the face of a Notice which is patently defective.

13. Rather than setting out a strict format to be followed in the case of every vote, subsection (6) of section 72 puts the question in terms of "ample opportunity", thus preserving the widest possible latitude for a trade union with respect to the possible procedures that it wishes to adopt. At the same time, however, the Board agrees with the observation of the British Columbia Board in the second of the *Letson and Burpee Limited* cases cited above, that this lack of detail in the legislation "requires the Board to make practical, common-sense judgments about the adequacy of the procedures followed in a particular vote". Again on the adequacy of notice in this case, the Board notes that the only reference to the purpose of the meeting was:

"AGENDA: Discussion, and a *VOTE* will be taken on a tentative agreement."

While a vote to ratify a proposed contract can, as occurred here, be simultaneous with or lead to a vote on the question of a strike, clearly it need not always do so. As the present case so amply demonstrates, there may be times when a proposed contract is put to the membership, but the trade union is not of the view that bargaining has come to a "head" so as to require the taking of a strike vote. This was precisely the situation at the January meeting in the matter before us. It is interesting to note that precisely the same language was used in the notice for that January meeting, at which the trade union did not intend to hold a vote upon a strike, as in the notice of June, when the trade union *did* have that in mind. It cannot be argued, therefore, that employees ought reasonably to infer one set of circumstances or the other from the form of notice which the respondent has used, or that reference to a vote to ratify necessarily carries with it the implication of a vote to strike. Here the Board feels that the use of the disjunctive "or" in the subsections *is* of significance, and shows a recognition by the Legislature that a vote on the one question is *not necessarily* synonymous with a vote on the other. Where, as here, the trade union in June had formed the view that the bargaining had to come to a head, and a strike vote was considered timely, the employees in the bargaining unit were entitled to express notice of that possibility, prior to any decision on whether or not to attend the meeting.

14. Had a single employee come forward to testify that the lack of proper notice had caused the employee to miss the meeting in question, the Board might well have had to consider the legal consequences of such inadequacies in the circumstances of the case before it. There was, however, no such complaint made out before the Board. Not a single employee who testified had not attended the meeting in question, and been given a fully adequate opportunity, we have found, to take part in the ratification or strike vote which ensued. Counsel for the complainants indicated to the Board at one point, in response to questioning from the Board, that as far as he understood (and he was retained in the matter well after the present complaint was filed) he represented, amongst the list of 35 complainants, 5 employees who were not in attendance at the meeting. No such employees, however, ever appeared at the hearing or came forward to testify. Indeed, it is difficult to see how an employee who did not attend the meeting could have signed the complaint in its present form, which begins:

The undersigned hereby state as follows:

(1) We are employees of Lilo-Rail of Canada.

(2) On or about the evening of Thursday, June 23, 1983, we attended a meeting called by our union

and continues in that vein throughout. The Board is not satisfied, therefore, that it has before it any supported claim on the basis of lack of proper notice of the meeting in question. The apparent defects, as a result, become academic in nature, and this last leg of the complaint is dismissed as well.

15. For all of the foregoing reasons, the complaint is dismissed.

0942-83-U The IBEW Construction Council of Ontario and The International Brotherhood of Electrical Workers, Local Union 894, Complainant, v. **C. E. Lummus Canada Ltd.**, Respondent

Construction Industry – Lockout – Unfair Labour Practice – Employer and UA agreeing to work four nine hours days per week at straight time – Complainant offered same deal or reduction in hours – Demand for forfeiture of overtime rights under threat of reduced hours constituting unlawful lockout – Attempt to alter provincial agreement contrary to section 146(2)

BEFORE: D. E. Franks, Vice-Chairman, and Board Members
I. M. Stamp and H. Kobryn.

APPEARANCES: *Alex Ahee and Robert Hill for the complainant; R. C. Filion, T. E. Ervin and K. R. Pierce for the respondent.*

DECISION OF THE BOARD; September 28, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that the respondent has acted contrary to the provisions of sections 64, 66, 67, 72, 75 and 146(2) of the *Labour Relations Act*, and in consequence requests that certain relief be directed by this Board.

2. The complainants herein are the council of the IBEW which negotiates the provincial agreement with respect to electricians in this province, and the local of the IBEW which has geographic jurisdiction in the Port Hope area. The respondent herein, C. E. Lummus Canada Ltd., (hereinafter referred to as "Lummus") is the prime contractor on a project for Eldorado Resources Limited ("Eldorado") in Port Hope. The parties are in agreement that the respondent Lummus is bound by the collective agreement between the Electrical Trades Bargaining Agency of the Electrical Contractors Association of Ontario, and the International Brotherhood of Electrical Workers and IBEW Construction Council of Ontario expiring April 30th, 1984 (hereinafter referred to as the "electricians' provincial agreement"). At the job site in question it would appear that although Lummus is bound by the provincial agreement the electrical work has been completely sub-contracted to five trade contractors who are bound by the electricians' provincial agreement.

3. The Port Hope project for Eldorado is one of two projects on which Lummus is the prime contractor. The other project is a project in Blind River. The Port Hope project began in February of 1982 and by the spring of 1983 the on-site work force consisted of approximately 750 employees, most of which were directly employed by Lummus, the remainder employed by sub-contractors. The various trades on the job site include insulators, millwrights, carpenters, operating engineers, sheet metal workers, ironworkers, painters, boilermakers, teamsters, electricians and labourers. It is clear on the evidence, however, that the major trade on the job site is the pipefitter (members of the United Association of Plumbers and Pipefitters (herein referred to as the "UA")) which numbered some 400 odd employees, that is, more than half of the work-force.

4. The evidence of Mr. Pierce (the senior representative of Lummus on the project) is that during the spring of 1983 there was a *drastic* decrease in the productivity on the job site. In fact, Mr. Pierce's estimate was that in January the productivity was running at some 110 per cent of expectations. However, by May of 1983 the productivity on the site had decreased to about twenty-five per cent of expectations. It is that decrease in productivity and Lummus' response thereto which gives rise to the present complaint. Lummus at this point was under great pressure from the client Eldorado to do something about the decrease in productivity, and it appears that Eldorado requested Lummus to formulate options on how to improve the productivity on site.

5. The evidence of Mr. Pierce is that Lummus analysed the lack of productivity as the result of two factors. Thus, Mr. Pierce suggested that one major problem was the fact that Friday was a low productivity day because as a consequence of the various provincial agreements applicable to the job site certain trades such as the electricians and pipefitters worked four hours whereas other trades such as the boilermakers and painters worked five or five and a half hours and still other trades such as the carpenters, labourers and ironworkers worked a regular eight hour day on Friday. This led to inefficient scheduling. The other cause of the low productivity was the pipefitters themselves. Indeed, under cross-examination Mr. Pierce acknowledged that the UA was in fact the total cause of the loss of productivity and that in fact the UA was in the process of conducting a "wobble" during the month of May. Further, he also acknowledged in cross-examination that there were no complaints about the productivity of the complainant electricians on the job site.

6. In response to the pressure from Eldorado to improve conditions on the job site Lummus commenced negotiating with Mr. St. Eloi, a senior representative of the UA. These negotiations it appears were conducted at the Port Hope site. The evidence is that a major concern of the pipefitters was the fifth working day. It appears that seventy per cent of the pipefitters on the job were not local tradesmen but were from out of town, and they were not happy about working four hours on Friday. Consequently, discussions centered around a four day workweek with various proposals being made for either nine or ten hours for each of the four days. It appears that Lummus reported these negotiations to Eldorado and Eldorado took the position that it was not prepared to pay overtime for an extended workday on the four day workweek. This was reported to Mr. St. Eloi and eventually an agreement was reached wherein Mr. St. Eloi would support a proposal for a four day workweek at nine hours of straight time plus travel benefits paid on a five day workweek basis notwithstanding the fact that only four days had been worked.

7. Up to this time Lummus appears not to have raised this issue with the other trades

on the job site, notwithstanding its obligations under the various provincial collective agreements for these other trades, including the agreement with the I.B.E.W., although Lummus was aware that the various agreements provided for normal workweeks with varying hours on Friday.

8. It appears that the first move that Lummus made with respect to the other trades was to deal with the stewards for its direct hire employees on the job site. These stewards apparently canvassed the various members of their unions and the result of these inquiries were that there was no great aversion to a four day workweek.

9. Subsequently, Lummus called a meeting of the various business agents of all of the trades on the job site for Wednesday, June 29th. The minutes of this meeting were filed as an exhibit in these proceedings and read as follows:

“Participants

A. Taggart, Insulators
 H. Carruthers, Millwrights
 Q. Begg, Carpenters
 G. Steers, Operators
 R. Hill, Electricians
 M. English, Sheetmetal
 S. Arsenault, Ironworkers
 W. Fairservice, Labourers
 M. Richtig, Painters
 E. Amos, LCI (Part-time) (LCI refers to “Lummus Canada Inc.”)
 K. R. Pierce, LCI
 T. Ervin, LCI
 E. Kapfer, LCI
 P. Bembenek, LCI

Mr. Ervin explained that the purpose of this meeting was to bring BusinessAgents up to date on recent developments on the Jobsite. Approaches had been made to him by some of the LCI Stewards about the possibility of their members working their regular weekly hours in 4 days. LCI decided to find out if this would be a viable proposition so the Stewards were asked at their meeting to take a consensus, in writing, of their members to see if enough people were interested before pursuing the matter further.

The survey revealed that the majority of LCI employees would like 4 days, although some were hesitant to put this in writing. The benefits received by any trade for a 5 day week would continue to be paid even though the employee worked only 4 days.

It was apparent that a 4 day week should be given serious consideration by LCI and the Business Agents should be brought together to seek their opinions. The Client’s approval to any change would have to be sought,

but they would probably be amenable to this as long as no extra costs were involved, i.e., overtime for extended hours.

After objections from the Business Agents that they felt they should have been brought into the matter when it was first raised, the following positions were stated.

Mr. Begg advised that there could be a problem with the second shift and was advised by Mr. Pierce that this would be dealt with separately. The new day shift hours for a 4 day week would commence at 7:00 a.m. and finish at 4:30 p.m. for the trades on a 36 hour week; 5:00 p.m. for a 37 1/2 hour week and 5:30 p.m. for a 40 hour week. This could back up the starting time of the second shift to 5:00 p.m. as the parking lots would not accomodate two shifts.

Mr. English commented that he would have no problem with this as his agreement had provision for a 4 day week. Mr. Taggart stated that the Insulators normally worked 4 x 9 hours and were presently working these hours on the job.

Mr. Ervin advised that Mr. Burrows, the UA Business Agent, could not attend the meeting but had indicated that he would allow his members to work their normal week in 4 days.

Mr. Arsenault advised that the Ironworkers could not go along with this unless the Ontario Erector's Association was in agreement, although, if it would increase manpower on the job, he would be in favour.

Mr. Hill advised that the Electricians would continue to work 4 x 8 hours and 4 hours on Friday. He felt that any change would be used in the next Agreement negotiations against the Electricians.

Mr. Carruthers said that he had a Collective Agreement to follow and he was afraid that if he agreed to this it would be used by other small contractors in the area as a way of getting out of paying overtime premiums. However, he would give consideration if it provided more work for his members.

The LCI personnel then left the meeting to allow time for the BA's to discuss the proposal. The outcome was that eight Unions out of nine would live by their agreements. It was pointed out by the BA's that they felt the matter had been approached in the wrong way and they should have been involved earlier as any amendments to their Collective Agreements must go through proper channels. Mr. Ervin explained that, in this instance, it was the individual employees who were seeking the change.

Mr. Pierce advised that split shifting would now be considered with the UA, Boilermakers, Sheetmetal workers and Insulators working a 4 day

week. The other trades could be left as they were, although Supervision and work planning would be a problem.

Mr. Ervin said that as the majority of BA's did not agree with the proposal a meeting would be held with the Stewards to explain the situation."

(emphasis added)

10. It is clear from the minutes of that meeting that Lummus wanted the other trades to accept the same conditions as had been agreed to by the UA representative, Mr. St. Eloi. Mr. Hill of the complainant IBEW local was under the impression at the end of the meeting on the 29th that nothing further would be done without further discussions on the four day workweek. This is certainly consistent with Mr. Ervin's reported statement at the end of the meeting.

11. Mr. Pierce explained in his evidence, however, that Mr. Hill left the meeting at lunch-time and that after a two hour lunch with cocktails some of the trades had changed their minds. The significance of this, however, is difficult to assess. It is to be noted that neither the UA or the Boilermaker representative was present at that meeting and on Mr. Pierce's analysis the flexibility to move to a four day workweek presented no problem to either the insulator or the sheet metal worker. It would appear that, at best, the only trade which changed its mind that day was the painter.

12. Mr. Pierce's evidence is that on the next day, Thursday, June 30th by 2:15 p.m. the business agent for the plumbers local in the area, Mr. Burrows, accepted in writing the proposal agreed to by Mr. St. Eloi for a workweek of four days at nine hours straight time. Lummus informed Eldorado of this and immediately issued the following notice on the afternoon of June 30th, 1983:

"Effective July 4, 1983, this job site will be scheduled for a four (4) day work week. Pipefitters, insulators, sheet metal workers, boilermakers and painters will be working extended hours on the 4 days to complete a standard work week in accordance with our agreement. Other crafts will be working 4 eight hour days unless some agreement is reached to the contrary.

This alteration to working hours has been made at the request of and with the agreement of the majority of crafts on site. Our Client has dictated that the job site be closed on Fridays. The hours of work shall be:

- (a) Crafts working 4 eights shall work 7:30 a.m. until 4:00 p.m.
- (b) Crafts working extended hours shall begin work at 7:00 a.m. and work until the completion of shift.

Pipefitters, sheetmetal workers, insulators shall work 9 hours per day; boilermakers and painters shall work 9 1/2 hours Monday, Tuesday & Wednesday and 9 hours on Thursday.

Lunch and break times shall remain as per the present arrangement, i.e., lunch at 11:30 a.m. and breaks at 9:30 a.m. and 2:00 p.m.”
(emphasis added)

It is to noted of course that June 30th was a Thursday, the Friday being a holiday, Monday, July 4th would be the first day back to work after the issuance of that memo. It is also clear on the facts that throughout the week of July 4th there were daily discussions between Lummus and Mr. Hill of the IBEW concerning acceptance by the IBEW of the 4 x 9 hour proposition.

13. On Friday morning July 8th the employees of the Electrical sub-contractors appeared for work at the regular starting time. There were some fifty-one tradesmen prepared to work at that time. They were not allowed on site, the job site having been completely closed (there was one exception, one person did in fact go to work, but that is not critical to the issue in dispute). It appears that since July 4th the electricians on site have been working 32 hours per week at regular time. They are not working the overtime hours during the week. They are not working the normal four hours on Friday. Mr. Hill, business manager of the complainant local, explained that this turn is working a real hardship on the members since a number of the fringe benefit packages involved hour banks and the reduction in hours was causing serious problems for the members in terms of their benefit packages.

14. The complainant alleges that these facts give rise to the violation of sections 64, 66, 67, 72, 75 and 146 of the Act. With respect to section 64, 66, and 67 we are unable to see that the conduct of Lummus displays an anti-union animus towards the complainants or constitutes interference with the operation of the trade union within the meaning of section 64 of the Act.

15. The complainant alleges that the respondent has conducted an illegal lock-out contrary to section 72(1) of the Act. That section reads as follows:

“Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.”

The other sections of the Act which need to be looked at are section 1(1)(k), that is the definition of “lock-out”:

“‘lock-out’ includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers’ organization, the trade union, or the employees.”,

and section 77 reads:

“Nothing in this Act prohibits any suspension or discontinuance for cause of an employer’s operations or the quitting of employment for cause if the suspension, discontinuance or quitting does not constitute a lock-out or strike.”

The definition of lock-out, section 1(1)(k) breaks down into two fundamental parts. On the one hand, the definition requires the “closing of a place of employment or a suspension of work...”. However, the mere closing of a place of employment does not in itself constitute a lock-out. The definition also requires that there be a purpose or a motive to the closing of the place of employment. That is, there must be “a view to compel or induce his employees... to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting the terms or conditions of employment or the rights, privileges or duties of the employer, an employers’ organization, the trade union, or the employees”. Thus to prove a lock-out under the *Labour Relations Act* the definition of lock-out requires the proof of the two elements, the closing of the place of employment and the motive behind the closing. This dual aspect in the definition of lock-out is in turn supported by section 77 of the Act which provides that nothing prohibits any suspension or discontinuation for cause of an employer’s operation. Thus, the discontinuance does not constitute a lock-out when an employer closes a place of employment or suspends work for cause and such cause is for valid reasons not disclosing the requisite motive for a lock-out.

16. On the facts of the present case, it is clear that the members of the complainant trade union have had their regular workweek changed from 36 hours to 32 hours per week. The argument by the respondent is that this change in the workweek is solely attributable to the closing of the workplace on Friday. As justification for this closing of the workplace on Friday, the respondent argues that the Friday was an uneconomic workday because of the staggered closing hours due to the various provincial agreements. Unfortunately, the present case is not as simple as suggested by the respondent. While it is true that the respondent has closed the work site on Friday, it is also clear that the respondent is offering to trades other than the pipefitters and in particular the complainant, a regular “thirty-six hour workweek” in the four days. That is, the employer has not reduced the amount of work on the project. Indeed, as the minutes of the 29th indicate the respondent is working two shifts on the job. We are, therefore, of the view that the cessation of work on Friday is not the cessation of work which is at the root of this matter. Indeed, we would note that had the respondent Lummus or Eldorado simply announced that the job site was closed on Friday this might be capable of justification and it might not be a lock-out.

17. The fact of the matter in the present case is that Lummus is continuing to employ people for their regular workweek providing they accept the straight time for overtime proposition. This is made clear in their memo to all employees of June 30th where the first paragraph reads:

“Effective July 4, 1983, this job site will be scheduled for a four (4) day work week. Pipefitters, insulators, sheet metal workers, boilermakers and painters will be working extended hours on the 4 days to complete a standard work week in accordance with our agreement. Other crafts will be working 4 eight hour days *unless some agreement is reached to the contrary.*”

(emphasis added)

That is to say that unless the trades arrive at some agreement with Lummus they will be limited to a thirty-two hour workweek. It is our view that that constitutes a cessation of work for four hours for the complainant during each workweek.

18. This brings us to the second part in the definition of a lock-out, namely, the motive. In this regard, it is patently clear that the four hours per week less which the complainants' members are working is in order to compel or induce the employees to modify the provincial agreement under which they are employed. In this regard we would note that it makes no difference as suggested by counsel for the respondent that the actual employees are employees of sub-contractors. It is clear that both Lummus and the trade sub-contractors are bound to the electricians' provincial agreement and that Lummus has sub-contracted the work pursuant to that agreement. While Lummus does not employ electricians it has closed the work site to the electricians employed by the sub-contractors. Not only is Lummus seeking to change its agreement with the electricians but it has closed the site to the sub-contractors' employees to induce those employees to change their collective agreement with their employers. It is clear that Lummus' intention is to modify both its relationship and the sub-contractors' relationship with the complainant and thus is either refusing either "...to continue to employ a number of his employees with a view to compel or induce his employees *or* to aid another employer to compel or induce his employees..." (emphasis added).

19. Further, we are of the view that Lummus cannot claim that its request to the electricians to modify their collective agreement is part of any broader economic justification. As Mr. Pierce's evidence indicates there was no problem with the productivity of the electricians, nor has there been a decrease in the overall work on the job site as evidenced by the continuation of the second shift. Indeed, it is clear that the productivity problem was dealt with by Lummus as a matter solely relating to the UA and that when Lummus commenced negotiating with Mr. St. Eloi of the UA, Lummus knew that it had outstanding obligations to other trades including the complainant. Once these negotiations with the UA appeared to be successful, the first reaction of Lummus was to deal with the stewards in order to test the reaction of the other tradesmen on the job site. Once Lummus felt that they had determined the views of the tradesmen they called a meeting of the business agents of the various trades. It is apparent that at that meeting on the 29th the other trades were not prepared to make an arrangement outside their provincial agreements. In those circumstances, Lummus gave its assurance to those business agents that nothing further would be done. However, on the very next day June 30th, once the local business manager of the UA local had signed the agreement negotiated by Mr. St. Eloi, Lummus proceeded to limit to thirty-two hours a week any trade who would not sign a similar agreement. Such a sequence of events is not consistent with economic justification for such a closure but can only be viewed as an attempt to apply economic pressure on the remaining groups to vary Lummus' obligation with those groups. That variation in the provincial agreement is clearly an economic benefit to Lummus in that it allows for the working of a nine hour day without the payment of double time for the ninth hour.

20. Counsel for Lummus argues that the job is primarily a pipefitter job and that the remaining trades are working to service the pipefitters. In certain circumstances, it may very well be that the working hours of the majority trade on the job site determine the workweek for the job site. However, that theory is again not consistent with Lummus' conduct in the present case. Clearly, Lummus tried to get the other trades to work a regular workweek in

four days and when negotiations appeared futile Lummus simply reduced their workweek to thirty-two hours.

21. For the foregoing reasons, therefore, we are of the view that Lummus has locked out members of the complainant trade union for four hours a week during the term of a collective agreement and has thus violated section 72(1) of the Act and we so declare.

22. It also follows, from the foregoing reasons that the respondent has also violated section 75 of the Act in calling the unlawful lock-out.

23. The complainant also alleges a violation of section 146(2). That section reads as follows:

“On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers’ organization, group of employers’ organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.”

While it is clear that the complainant trade union and the respondent have not arrived at an arrangement, it is clear that Lummus has persisted in attempting to achieve such an arrangement. This in itself constitutes a violation of section 146(2) and we would direct the respondent Lummus to cease attempting to negotiate an agreement other than a provincial agreement with the complainant.

24. At the root of the present case is the arrangement between Lummus and the UA which as we have found Lummus is coercing the complainant to accept. It is not for this panel of the Board to decide whether that arrangement between the UA and Lummus is itself a violation of section 146(2) of the Act. That complaint is not before this Board nor are the parties to such an arrangement before this Board. We cannot help but notice, however, that in all the evidence relating to that arrangement no mention was made of either the Employer or the Employee Bargaining Agency which are the designated parties to that provincial agreement. We mention this because with reference to the present case we are of the view that the problem faced by Lummus and Eldorado is not insoluble. Nothing prevents the complainant provincial council and its counterpart, the Employer Bargaining Agency, from amending the present electricians’ provincial agreement to specifically accommodate the kind of problem faced by Lummus at the Eldorado job site. The Employer and Employee Bargaining Agencies have exclusive bargaining rights and it is their obligation to be responsive to the needs of the construction industry. The point, however, is that it is the two bargaining agencies which must ultimately formulate any amendment to that provincial agreement, and this is not something that Lummus can do on its own.

25. The remedies requested by the complainant in the present case are as follows:

“(a) Declare that the Respondent Company, through its actions has caused its sub-contractors on the project to violate the ICI Collective Agreement.

(b) Direct that the Respondent Company cease and desist the action’s complained of.

(c) Direct that the Respondent Company pay to the International Brotherhood of Electrical Workers members on the project, the appropriate wages and fringe benefits for the period that they are denied employment each Friday.

(d) Grant such further and other relief as may be necessary in the circumstances.”

There is no evidence that the respondent has caused the sub-contractors on the project to violate the ICI collective agreement. We have, as noted above, directed the respondent to cease and desist from attempting to negotiate an arrangement other than the provincial agreement with the complainant. We have also found that the respondent has engaged in an unlawful lock-out during the term of the collective agreement and we hereby direct the respondent to forthwith cease and desist from continuing that unlawful lock-out. The complainant has asked for damages in respect of this lock-out, and we are of the view that they are entitled to such relief. We remain seized of this matter in the event that the parties are unable to agree on the quantum of damages herein.

0162-83-U Ontario Public Service Employees Union, Complainant, v. Mini-Skool Ltd., Respondent.

Duty to Bargain in Good Faith – Interference in Trade Unions – Strike – Unfair Labour Practice – Junior employees exercising right to return to work during lengthy strike – strike resulting in temporary reduction in work – Employer refusing to accept recall procedure permitting senior striking employees to bump junior employees upon end of strike – Not result of employer discrimination but by-product of relative bargaining power of parties – Not amounting to grant of “super-seniority” to non-striking employees – No violation

BEFORE: George W. Adams, Q.C., Chairman and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *Alick Ryder, Q.C., for the complainant; and A. P. Tarasuk for the respondent.*

DECISION OF THE BOARD; September 15, 1983

1. This is a complaint under section 89 of the *Labour Relations Act*. The complainant union and respondent employer engaged in collective bargaining in 1982 culminating in a lawful strike on or about October 8, 1982. Apparently all bargaining unit employees engaged in the strike the first day. However, before the end of the strike at least seven of the original strikers returned to work and crossed the complainant's picket lines and, as well, three strike replacement employees were hired. The strike was an extremely bitter one dividing the parents whose children were originally cared for at the school as much as it divided the employees. The striking employees set up “an alternative school” which was supported by some of the affected parents and this added to the conflict's intensity. Parents who continued to bring their children into the respondent's school came to be seen as supporting the employer and were subjected to the same verbal abuse which was directed at returning and replacement employees. The parents who were subjected to this picket line invective called at least two meetings with the respondent and indicated that they would withdraw their children from the school if the respondent, after settling the strike, permitted strikers to have contact with their children. There is no evidence that the respondent manipulated this emotion. There is no evidence that the respondent, other than the matter alleged to be improper and subject to this complaint, acted contrary to the Act in its relationships with the respondent and striking employees. It is also a fact that a number of parents withdrew their children from the respondent's school and permanently sought alternate day care services having no connection with the dispute. The resultant shrinking of available bargaining unit work later contributed to the matters complained of herein.

2. The strike continued for many months and attracted considerable media coverage and the attendance of many of Ontario's high profile labour leaders on the picket line. On April 13, 1982 the Executive Assistant to the complainant's President became involved in the dispute. With Mr. Warrian's involvement seems to have come a fresh perspective and a new point of departure in the dispute. In fact, the parties resolved all of their outstanding differences on that day other than the question of discipline issued to two employees and the procedure by which striking employees would be recalled to work. Unfortunately, it was this latter matter that ultimately continued the impasse. On April 15, 1982 the parties reduced their

“agreement” to written form and a subcommittee was struck to implement the return to work procedure “in accordance with seniority”. The memorandum of agreement had not been signed prior to the deliberations of the subcommittee and as a result of the work of that committee it became apparent that the parties were in disagreement over what they had purported to agree upon in relation to the return to work clause. The memorandum of agreement provided:

RETURN TO WORK OF STRIKING EMPLOYEES

Based on the Employer’s manpower requirements striking employees will begin to return to work as soon as possible following date of ratification. In any event the Employer will endeavour to start returning employees within two (2) weeks following the date of ratification of the collective agreement. *It is understood that striking employees will be returned to work, as openings occur, based on job classifications and seniority.*

NO RECRIMINATION

The Union, its representatives, bargaining unit employees and the Employer agree that there will be no discrimination or recrimination against any of the parents or employees because of their involvement or non-involvement in the strike. Any employee who violates this Article will be suspended for two weeks without pay. In the event it occurs a second time the employee will be terminated.

[emphasis added]

3. The respondent took the position that the first paragraph of the memorandum was intended to clarify the intended retention in active employment of three employees who were junior to many striking employees and who had returned to work during the strike pursuant to section 73(1) of the Act. The complainant, on the other hand, claimed not to understand that the clause would have this result and, on learning of the respondent’s view during the work of the subcommittee, refused to execute the memorandum. The strike, therefore, continued. Subsequently, on April 22, 1983, the complainant filed the instant complaint alleging, inter alia, that the recall scheme amounted to “super-seniority” for teachers who supported the respondent and did not participate in the strike. It complained that, in this way, employees who supported the strike were being punished contrary to the preamble of the Act and to sections 3, 15, 66(a) and 70.

4. The parties then came before this Board and, with the assistance of the panel, it was agreed by the parties that the complainant would put the memorandum of agreement to a ratification vote of all employees. It was further agreed that ratification would not prevent or in any way affect the prosecution of this complaint should the complainant wish to pursue the matter.

5. The collective agreement entered into between the respondent and complainant did not change any of the general terms of the seniority provision of the expired contract dealing with lay-off and recall. These unchanged provisions carried forward into the current agreement provided, in part:

10.01 Definition of Seniority

Seniority as referred to in this agreement shall mean length of continuous service in the employ of the Employer in the bargaining unit.

10.06 Lay-offs and Recalls from Lay-offs

Lay-offs and recalls from lay-offs will be made by job classifications. The Employer will consider the requirements and efficiency of operations, staff/child continuity relationships, educational qualifications, the knowledge, training, experience, skill and present ability of the individual to perform the required work in determining which employee is to be laid off or recalled from lay-off and where these are, in the justified opinion of the Employer, equal, the employee with the greatest seniority will be the last to be laid off and, conversely, the first to be recalled from lay-off. For the purposes of this article, a lay-off means a lay-off for more than ten (10) working days.

6. It is agreed that employees who returned to work prior to the end of the strike did so pursuant to section 73(1) of the Act. This dispute between the parties, however, arose after the six month period stipulated therein. We also observe that the dispute centres not on the right of the striking employees to bump replacement employees but rather on their right to bump more junior employees who too were members of the bargaining unit at the commencement of the strike. That provision reads:

73. -(1) Where an employee engaging in a lawful strike makes an unconditional application in writing to his employer within six months from the commencement of the lawful strike to return to work, the employer shall, subject to subsection (2), reinstate the employee in his former employment, on such terms as the employer and employee may agree upon, and the employer in offering terms of employment shall not discriminate against the employee by reason of his exercising or having exercised any rights under this Act.

(2) An employer is not required to reinstate an employee who has made an application to return to work in accordance with subsection (1),

(a) where the employer no longer has persons engaged in performing work of the same or similar nature to work which the employee performed prior to his cessation of work; or

(b) where there has been a suspension or discontinuance for cause of an employer's operations, or any part thereof, but, if the employer resumes such operations, the employer shall first reinstate those employees who have made an application under subsection (1).

7. At the time of the final hearing in this matter eleven striking employees had been recalled. Eight of these employees claim to have had their recall delayed by not being able "to bump" three less senior non-striking employees who had earlier returned to work during

the strike pursuant to section 73. Presumably, the other employees who returned to work pursuant to section 73 were more senior than the striking employees. The few final and salient facts include that upon the settlement of the strike and the return to work of these striking employees, several parents who had crossed the picket lines withdrew their children from the school stating that they were unwilling to have their children taught by those who had verbally abused them (both child and parent) during the strike. As well, several parents who continue to send their children to the school have requested that their children be cared for by non-striking employees. They have also advised the respondent that they will withdraw their children if they are assigned to striking employees because of the verbal abuse inflicted during the strike. The school, to date, is at less than half of its capacity; but there is every prospect that it will return to its previous complements of teachers and children by the end of the summer.

8. The respondent tendered four reasons for taking the position that it did with respect to the recall issue. First, the parents were in fact indicating they would refuse to allow their children to be cared for by striking employees because of the verbal abuse. Secondly, there was no provision in the expired contract pertaining to the return to work of striking employees. Thirdly, the more junior employees which striking employees wished to bump had exercised their right to return to work under the Act. And finally, the respondent felt a loyalty or commitment to employees who crossed the picket line and assisted it to operate during the strike. The complainant, on the other hand, submits that the respondent's interpretation of the disputed clause is unlawful because it gives preference to non-striking employees (referred to as "super-seniority") and therefore amounts to punishment for having exercised a fundamental right under the Act. The complainant believes that it would violate the trade union's duty of fair representation if it signed a memorandum containing such a clause. Heavy reliance was placed on a recent decision of the Canada Labour Relations Board in *Eastern Provincial Airways Ltd. and Canadian Air Line Pilots' Association* issued May 27, 1983, decision #419, Board Files 745-1449, 1450, 1451, 1467 and 1470. The complainant further argues that the insistence of the respondent on the unlawful clause delayed the settlement of the dispute and caused financial loss to striking bargaining unit employees. The complainant also submits that section 73 has no application to the facts at hand because it deals with the rights between employers and individual employees. Finally, the complainant contends that the clause cannot be justified as a transitional tool to meet the problems of the parents because the clause applies to all striking employees whether they engaged in misconduct or not. Counsel urged this Board not to start out along the "slippery slope" of accepting discriminatory acts provided they are demanded by customers and not employers.

9. This case involves a fundamental labour law issue. There can be no doubt that employees have statutory protection when they engage in strike activity. They cannot be discriminated against or punished for having engaged in this "protected" activity. This case requires a determination on whether the failure of an employer to agree to a recall procedure that permits senior striking employees to bump or replace non-striking bargaining unit employees constitutes a breach or a violation of the protections accorded to striking employees under the legislation.

10. From the striking employees' viewpoint, it is objectionable that employees with less seniority are working following the conclusion of the strike. It is therefore understandable that they might link the lack of work solely to their participation in the strike. The more junior employees are working, but the striking employees are not because the more junior employees

did not strike. It is also somewhat understandable if the striking employees conclude that they are being punished for having engaged in a lawful strike. On the other hand, from the employer's viewpoint, a company has a lawful right to continue operations during the currency of a lawful strike. To operate during a strike, it may be necessary to perform bargaining unit work by the employment of strike replacements and the efforts of existing employees willing to refrain from striking and to cross the picket lines. In this case, the Board is only dealing with bargaining unit employees who elected to discontinue their strike and to come into work on terms and conditions of employment offered by the employer. But an employer's perspective would not depend on this distinction. The employer can also point to the fact that the expired and current collective agreements contain no general seniority provision providing for the recall of striking employees in accordance with seniority, and the resultant bumping of incumbent employees. With the absence of any contractual right to obtain the displacement of non-striking employees, the employer can reasonably assert that the lack of work for striking senior employees is the incidental by-product of (i) these employees voluntarily going out on strike; (ii) the right of the employer to continue his operations by hiring replacements or by using non-striking bargaining unit employees; and (iii) the shrinkage of bargaining unit work caused by the impact of the strike. He would therefore submit that the situation complained of by these striking employees is not a matter of his intention but rather a product of the economic reality of a trade union having engaged in a strike in which it lacked the bargaining power to negotiate a provision providing for the lay off of non-striking employees in favour of more senior striking employees. Which of these two perceptions is most consistent with the scheme of the legislation?

11. While not directly on point, an early but leading American case merits review at the very outset of our analysis. In *National Labor Relations Board v. MacKay Radio Company & Telegraph Company*, 2 LRRM 610 (USSC 1938), the National Labor Relations Board and the United States Supreme Court were confronted with a number of questions centering on the status of striking employees and their right to return to work following the cessation of a strike during which the employer had continued to operate through the employment of strike replacements. The Court noted that section 2(3) of the *National Labor Relations Act* specifically provided that an employee included "any individual whose work has ceased as a consequence of, or in connection with, any current labour dispute or because of any unfair labour practice, and who has not obtained any other regular and substantially equivalent employment,...(at page 614)." Thus strikers, the Court held, remained employees for the purposes of the Act and were protected against the unfair labour practices denounced by it. The Court, however, also noted it did not follow that an employer, guilty of no act denounced by the statute, had lost the right to protect and continue his business by supplying places left vacant by strikers. The Court further noted that he was not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. In that case the Court held that an assurance by the respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labour practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. In fact, however, the respondent employer's conduct was censured by the Board and the Court because it was found that the respondent refused to reinstate certain striking employees for the reason that they had been active in the union. Nevertheless, the general principles articulated by the Court have been followed by the NLRB and the American courts from that time forward. Indeed, at least one justice of the Supreme Court of Canada, Mr. Justice Locke, in *Canadian Pacific Railway Co. v. Zambri* (1962), 62 CLLC ¶15,407 at p.451, indicated his view that the collective bargaining scheme envisaged by *MacKay Radio* was the law in Canada as well. In this respect he wrote:

While unnecessary for the disposition of this appeal, I wish to express my dissent from the opinion that has been stated that if a strike is never concluded by s. 2(3) of the *National Labor Relations Act* specifically provided that an employee included “any unit employees; and k to work, taken employment with other employers, died or become unemployable. When employers have endeavoured to come to an agreement with their employees and followed the procedure specified by the *Labour Relations Act*, they are at complete liberty if a strike then takes place to engage other to fill the places of the strikers. At the termination of the strike, employers are not obliged to continue to employ their former employees if they have no work for them to do, due to their positions being filled. I can find no support anywhere for the view that the effect of the subsection is to continue the relationship of employer and employee indefinitely, unless it is terminated in one of the matters suggested.

Subsection (2) of s.1 appeared first in Ontario legislation in c.33 of the Statutes in 1950. Legislation of this nature appeared at an earlier date in the *Strikes and Lockouts Prevention Act of Manitoba*, being c.40 of the Statutes of 1937, and in the *Wartime Labour Regulations* prescribed by the Governor General in Council on February 17, 1944, which were adopted in Manitoba by c.48 of the Statutes of 1944. Similar legislation was enacted thereafter in the *Industrial and Conciliation Arbitration Act of British Columbia* and the *Alberta Labour Act*.

The idea of creating this artificial relationship appears to have originated in the *National Labour Relations Act of the United States*, commonly referred to as the *Wagner Act*, passed by Congress on July 5, 1935, section 2 of which declared that the term “employee” shall include any individual whose work had ceased as a result of a current labour dispute and who has not obtained any other regular and substantially equivalent employment.

I do not construe the decision in *Jeffrey-DeWitt Insulator Company v. National Labour Relations Board*, (1937) 91 Fed. (2nd) 134, and *National Labour Relations Board v. Mackay Radio and Telegraph Company*, (1938) 304 U.S. 333, as deciding that in the United States the relationship continues indefinitely unless that relationship has been abandoned, as has been said.

In the first of these cases, the employer had refused to bargain with the union, which represented its employees on the ground that by striking they had ceased to be such and Parker, J., held that this was an unfair labour practice since the strike did not in itself terminate the relationship either at common law or under the *Wagner Act*.

In the second case decided in the Supreme Court, the employer, following the settlement of the strike, had refused to employ five men on account of union activities during the strike, and the finding that this was an unfair labour practice was upheld, reversing the judgment of the Cir-

cuit Court of Appeals. Roberts, J., who delivered the judgment of the court, said, *inter alia*, that it did not follow that an employer guilty of no act forbidden by the statute had lost the right to protect and continue his business by supplying places left vacant by the strikers and was not bound to discharge those he had thus hired upon the election of the strikers to resume their employment in order to create places for them. That is the law in Canada also, in my opinion.

I would dismiss this appeal with costs.

While we are not bound by either "the *Mackay* doctrine" or Mr. Justice Locke's obiter in *Canadian Pacific Railway Co. v. Zambri*, they are significant views of the nature of the employment relationship in the context of the economic contest between employers and employees created by collective bargaining. From this perspective, an employer's right to continue his business is not encroached upon by collective bargaining laws and a normal incident of continuing to operate is the act of hiring. On the other hand, these same labour laws have made clear that this act of hiring does not terminate the employment relationship of striking employees although without clear statutory language to the contrary, there is no legal entitlement to one's former position if it has been filled. This is the way the *Mackay* Court saw the system operating.

12. On the other hand, and as Professor Paul Weiler has observed, this line drawn between unlawful discharge and lawful permanent replacement is seen by many as a legal distinction without a factual difference. See Weiler, *Reconcilable Differences* (1980) at page 76. Why should employees, it can be asked, need to risk loss of their jobs to engage in the collective bargaining process? Moreover, the threat of permanent replacement can incite ugly violence as long service and older workers witness replacements going to work each day across the picket lines to perform "their work". It was these concerns that eventually lead to passage in Ontario of section 73 of the *Labour Relations Act*. This section guards against the permanent loss of an individual's job where he has struck and his employer has continued to operate through the employment of strike replacements. Employees engaging in collective bargaining are assured that the decision to participate in a strike need not inevitably put one's job at risk. But while the *Mackay* doctrine was seen as too discouraging of collective bargaining, the balancing considerations for this greater job security for striking employees in Ontario provided that the statutory resumption of employment would be on such terms as the employer and employee might agree and the right would apply for only six months from the commencement of the strike. In fashioning a policy initiative in this area, the Legislature recognized it was potentially affecting bargaining power and attempted to balance or minimize the impact of its intervention on the collective bargaining process and on the then existing strengths of labour and management.

13. In *The Becker Milk Company Limited and Ind-Ex Distributors Limited*, [1977] OLRB Rep. Dec. 797, [1978] 1 Can. LRBR 175, this Board reviewed the impact of section 73 against the principles that existed prior to its enactment in the following terms (at pages 179 - 180 of the Can.LRBR report):

Ordinarily when a strike is successful the striking employees return securely to their jobs as a result of the negotiated settlement. But not all strikes are won. When a strike has ended and has ended in failure, what

are the legal rights of the unsuccessful strikers with respect to their jobs, particularly when those jobs have been filled by replacements hired during the strike?

It is an accepted principle of industrial relations law in Ontario that a struck employer has the right to protect and continue his business. He may try to do that in a number of ways. He may seek to contract-out the work of the struck bargaining unit. He may re-arrange the work of non-striking employees, insofar as their employment contract allows. He may press management staff into work on the shop floor on a fill-in basis. Or he may hire replacements. Thus when a strike has ended in failure and his union has been unable to negotiate a return-to-work clause, the unsuccessful striker may find that his job is held by a replacement. Does that fact change his status as an employee under The Labour Relations Act?

It was apparently once thought in both Canada and the U.S. that while a strike itself would not terminate an employee's status (because of the protection of section 1(2) of The Labour Relations Act and the similar provision in section 2(3) of The National Labour Relations Act) the separate act of hiring a replacement by the employer during the strike did have the effect of ending the employment status of the striker who was replaced. (See *Royal Commission Inquiry Into Labour Disputes*, the Hon. I.C. Rand, Aug., 1968 at p.24; *Bartlett-Collins Co.* 110 N.L.R.B. 395 (1954); *Atlas Storage Division v. N.L.R.B.* 112 N.L.R.B. 1175 (1955), enforced *sub nom. Chauffeurs Teamsters & Helpers Local No. 200 v. N.L.R.B.* 233 F. 2d 233 (7th Cir. 1956); *Brown and Root Inc.* 132 N.L.R.B. 486 (1961), enforced, 311 F. 2d 447 (8th Cir. 1963).

That limited interpretation of section 1(2) was criticized by the Rand Royal Commission as being in unjustified disregard of the rights and benefits of employees accumulated over years of service. According to the Commission that view ignored the fundamental purpose of the section by placing the economic life of the employee at the arbitrary will of the employer. To maintain that the act of hiring replacements would extinguish all of the vested rights and the very employment status of strikers would, in the words of the Report, "reduce the validity of a strike to mockery".

Whatever uncertainty there may have been in this province with regard to that issue was resolved one year after the tabling of the Rand Report. In its decision in *McLeod*, (*supra* at p.1104) the Board expressly rejected the contention that the hiring of a replacement terminated the employment status of a striking employee that is protected by section 1(2). Similarly, in the United States the National Labour Relations Board and the courts have corrected the course of earlier decisions and have interpreted section 2(3) of the National Labour Relations Act as preserving the status of strikers as employees notwithstanding the hiring of replacements by the employer during the strike. (*N.L.R.B. v. Fleetwood Trailer Co.* 389 U.S. 375 (1967), enforcing 153 N.L.R.B. 425 (1965); *Laidlaw Corp. v.*

N.L.R.B. 414 F. 2d (7th Cir. 1969) and see generally Martin, "The Rights of Economic Strikers to Reinstatement: A Search for Certainty" (1970) *Wisc. L. Rev.* 1090).

But what is the extent of an employee's right under section 1(2)? More particularly, does the employee who returns to work after a strike have a right to "bump" a replacement and assume his old job? In Ontario that will depend on whether he returns under the protection of section 64 [now 73] of the Act.

Under The Labour Relations Act strikers continue to be employees and they are not to be discriminated against for having exercised their right to strike. When a strike that lasts beyond six months ends in failure there may be existing job vacancies that subsequently arise by the departure of replacements or the creation of new jobs. The qualifications of the former strikers to fill those jobs may in many cases be inferred from their original hiring and past employment. An employer who refuses to give those jobs to returning employees qualified to fill them commits an unfair labour practice to the extent that the refusal amounts to a calculated penalizing of a group of employees for having exercised their lawful right to strike. (cf. *Fleetwood Trailer Co.*; *Laidlaw Corp.* (*supra*)). The refusal of an employer to put employees back to work in those circumstances is no less a breach of the Act than any attempt to discharge them outright for engaging in the right to strike (cf. *Webster v. Horsfall* 69 CLLC §16,050). But, subject to whatever better rights their union can obtain for them, that appears to be the limit of the protection that strikers in that circumstance can expect. *An integral feature of the balance of power in collective bargaining is that strikers who return to work without the protection of section 64 [now 73] of the Act cannot, as a legal right, displace replacements who were hired in their stead.*

[emphasis added]

14. This statement of principle was applied in *Fotomat Canada Limited and United Steelworkers of America*, [1980] OLRB Rep. Oct. 1397, [1981] 1 Can.LRBR 381 at pages 409-410, although an exception was developed in that case to deal with the situation where a strike had been taken beyond the six month period by the commission of independent unfair labour practices by the employer. In this respect the Board stated:

...As a strike endures, the commitment of an employer to the employees who have helped it resist the strike may become great and, in the usual case, it is for the negotiation process to reconcile this commitment with the interest of striking employees to return immediately to their jobs. Where the trade union is unable to negotiate their immediate return because of the employer's commitment to replacement employees, striking employees who make an unconditional application to return have to be treated, essentially, as employees on layoff and must be considered in filling subsequent vacancies. The rationale to this conclusion is found in the *Becker Milk* case quoted above and in *Fleetwood Trailer Co.* (1967), 66 LRRM 2737. Thus, while the letter of June 27, 1980 may

convey the respondent's intention not to recall striking employees immediately to the detriment of strike replacement employees, this is not in itself improper. There is no indication in the letter that striking employees would, on their unconditional application, be refused access to subsequent vacancies.

We are therefore left with the complainant's second argument – that to fail to reinstate the striking employees would simply reward the respondent having brought the complainant “to its knees” by unlawful means. This raises the appropriateness of such a remedy in the circumstances and the related question of whether it is necessary to effectuate the policies of the Act.

In many cases coming before the National Labor Relations Board, such as *Laidlaw Corp.* (1968), 68 LRRM 1252, affirmed (1969), 71 LRRM 3054 (CA-7), cert. denied (1970), 73 LRRM 2537 (U.S.S.C.), it has been plain that the employer's unfair labour practices caused the employees to initiate or prolong a strike and in such cases the Board has quite uniformly ordered the employer to reinstate the striking employees to their former positions, discharging if necessary replacements hired during the strike. That Board has, therefore, treated the unfair labour practice striker somewhat more favourably than the economic striker in the sense that the latter employee has no immediate right to reinstatement without a settlement to this effect. See *NLRB v. MacKay Radio and Telegraph Co.* (1938), 304 U.S. 333, 58 S.Ct. 904. This distinction can become very significant where a strike is initiated over bargaining demands but, during the course of the strike, the employer commits unfair labour practices. The employer's unfair labour practices will be held to “convert” the strike if it can be determined that the employer's actions prolonged the strike beyond the date it would have been terminated as only an economic strike. For example, in the *Laidlaw Corp.* case, *supra*, the Board applied the “conversion” doctrine and found that what had begun as an economic strike was converted into an unfair labour practice strike when it was prolonged by the union's vote to protest the employer's outright termination of strikers seeking reinstatement. The Board applied its usual rule that the strikers who were permanently replaced during the economic phase of the strike were not entitled to immediate reinstatement, while the strikers replaced after the date of conversion were.

We do not think that the OLRB needs to adopt all the American trap-pings of an unfair labour practice strike, but the concept's underlying purpose has considerable relevance to the exercise of this Board's jurisdiction under section 79 [now 89]. Where, for example, employees go on strike and it is subsequently determined that the employer has committed certain basic and flagrant unfair labour practices, their security of employment may become a remedial issue. This may, particularly, be the case where the period under section 64 [now 73] has lapsed and the only opportunity for immediate reinstatement without a remedial order from the Board is through a negotiated settlement to that effect. If the trade

union's capacity to negotiate that result has been put into question or eroded by the employer's unlawful resistance, the failure of the Board to provide for the return to work of striking employees would have the result of rewarding the employer for his unlawful actions. On the other hand, as a strike endures strike replacement employees who have been permanently hired develop an interest in their job which this Board cannot ignore. Their interests should be considered in light of the time and gravity of the employer's unfair labour practice together with any expectations they might have as a result of employer commitments.

15. We have reviewed the labour relations debate surrounding the status of striking employees in relation to strike replacements in order to put the complainant's claims in perspective. Section 73 can be seen as an implicit statutory recognition of the *Mackay* approach in that the provision would have a very limited role if, as a matter of the general unfair labour practices sections, every striking employee had a statutory right to the return of his job at the conclusion of a strike. But what is important to understand is that the complainant is asserting the much more tenuous claim that striking employees have a statutory right to replace fellow employees with whom they were employed at the commencement of the strike and who exercised their statutory right to return to work pursuant to section 73. In fact, even if the complainant were asserting this claim within the six month period and on the basis of section 73, it is far from clear that senior striking employees could rely on the section to replace more junior employees working in a common classification they had all worked in prior to the strike's commencement particularly where the junior employees had returned to work first pursuant to the section. There was a temporary shortage of work due to the strike and the respondent allocated part of the available work to persons in his active employ. There is the expectation that as the enrollment returns to capacity all striking employees will be recalled. The interest of the grievors is therefore much less compelling than that of striking employees who have been permanently replaced by fresh hires. And yet the existence of section 73 is some evidence that this (permanent replacement) is the potential economic reality otherwise facing striking employees. Because of the expiration of the six month period, the grievors could not replace or bump strike replacement employees hired after the strike commenced. Therefore, why should they have any greater statutory entitlement against employees with whom they worked prior to the commencement of the strike and who returned to work pursuant to the statute?

16. Having regard to the foregoing, we are unwilling to characterize the posture taken by this employer in these negotiations with respect to the recall of striking employees as a breach of the Act. The employees voluntarily refused to work and engaged in a lawful strike. Equally, the employer lawfully decided to continue to operate and certain of the bargaining unit employees sought active employment pursuant to section 73(1). At the conclusion of the strike, the complainant was unable to negotiate a provision requiring the displacement of the active but more junior employees by more senior striking employees. It is our view that the situation in which striking employees found themselves at the conclusion of the strike was the incidental effect of having engaged in a lawful strike which they could not end on more preferable terms and not the product of any discriminatory intent by their employer violative of the *Labour Relations Act*. We also do not think the complainant's reference to section 68 adds anything to this analysis. Given our understanding of the scheme of the Act, the complainant could not violate section 68 by agreeing to the provision in question given the circumstances. This case, to some extent, is similar to the problem that confronted the Board in *Westroc*

Industries Limited, [1981] OLRB Rep. Mar. 381. In that case the employer had locked out his employees and hired temporary replacements. On the facts before it, the Board was satisfied that the employer wished a collective agreement but on his terms and that the tactics employed were consistent with the scheme of the Act and the nature of economic confrontation when collective bargaining has been pursued to impasse. Similarly, in the facts before us in this case, the situation of the striking employees was the natural outcome of economic conflict. We decline to hold that the respondent employer's position was so unfair or inherently discriminatory as to merit censure.

17. Counsel for the complainant referred to the clause in question as giving "super-seniority" to non-striking employees. This, of course, is a characterization important to the complainant's argument but a characterization not sustained by analysis of the collective agreement between the parties to this dispute. There is no provision in either the expired or the current contract, other than the clause in dispute, that deals directly with the orderly recall of striking employees following the conclusion of a strike. In this connection we note it has been held that the temporary severance of an active employment relationship by a trade union having called a strike is not properly characterized as a lay-off. That is to say, arbitrators have accepted the notion that a lay-off is a method by which an *employer* reduces his employment complement. Accordingly, it has been held that when employees are on strike, they are not on lay off. See Brown and Beatty, *Canadian Labour Arbitration* (1977) at page 236. It is therefore questionable that employees who have been absent from work owing to a lawful strike can assert their seniority for the purposes of immediate recall under general seniority and lay-off provisions if the effect is to bump immediately on the conclusion of the strike more junior employees who continued to work. See *Smith Brothers Motor Bodies Ltd.* (1965), 16 L.A.C. 255 (Lane); and *North American Cyanamide Limited* (1954), 5 L.A.C. 1650 (Fuller) at p.1654. In short, the arbitral jurisprudence suggests that the negotiating onus was probably on the complainant to negotiate a provision specifically providing for the bumping of active junior employees by more senior striking employees. Super-seniority then is not an appropriate characterization of the effect of the clause in question. There is no suggestion that, after all employees have been recalled, non-striking employees will have more seniority to exercise against striking employees than they would otherwise have had. From the respondent's point of view, the clause can be characterized as simply a clarification of the application of seniority to the recall of employees who have absented themselves from work to engage in a lawful strike. Once all employees have been recalled, senior striking employees will continue to have more seniority than the more junior employees who worked during the strike.

18. The classic unlawful application of a super-seniority system over which there could be no debate was dealt with by the United States Supreme Court in *NLRB v. Erie Resistor Corporation*, 53 LRRM 2121 (1963). In that case, both the Board and the Court found that an employer had violated the *National Labor Relations Act* by offering a 20 year seniority credit to strike replacements and to strikers who abandoned the strike and returned to work even though the employer claimed to believe this guarantee was necessary to continue operations during the strike. In upholding the Board's analysis of super-seniority and its conclusion that the plan was inherently discriminatory, the Supreme Court reviewed the Board's reasoning at page 2125 in stating:

The Board made a detailed assessment of super-seniority and, to its experienced eye, such a plan had the following characteristics:

(1) Super-seniority affects the tenure of all strikers whereas permanent replacement, proper under Mackay, affects only those who are, in actuality, replaced. It is one thing to say that a striker is subject to loss of his job at the strike's end but quite another to hold that in addition to the threat of replacement, all strikers will at best return to their jobs with seniority inferior to that of replacements and of those who left the strike.

(2) A super-seniority award necessarily operates to the detriment of those who participated in the strike as compared to nonstrikers.

(3) Super-seniority made available to striking bargaining unit employees as well as to new employees is in effect offering individual benefits to the strikers to induce them to abandon the strike.

(4) Extending the benefits of super-seniority to striking bargaining unit employees as well as to new replacements deals a crippling blow to the strike effort. At one stroke, those with low seniority have the opportunity to obtain the job security which ordinarily only long years of service can bring, while conversely, the accumulated seniority of older employees is seriously diluted. This combination of threat and promise could be expected to undermine the strikers' mutual interest and place the entire strike effort in jeopardy. The history of this strike and its virtual collapse following the announcement of the plan emphasize the grave repercussions of super-seniority.

(5) Super-seniority renders future bargaining difficult, if not impossible, for the collective bargaining representative. Unlike the replacement granted in Mackay which ceases to be an issue once the strike is over, the plan here creates a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is re-emphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.

In the light of this analysis, super-seniority by its very terms operates to discriminate between strikers and nonstrikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted. The origin of the plan, as respondent insists, may have been to keep production going and it may have been necessary to offer super-seniority to attract replacements and induce union members to leave the strike. But if this is true, accomplishment of respondent's business purpose inexorably was contingent upon attracting sufficient replacements and strikers by offering preferential inducements to those who worked as opposed to those who struck. We think the Board was entitled to treat this case as involving conduct which carried its own indicia of intent and which is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of union rights. The Board concluded that the business purpose asserted was insufficient to insulate the

super-seniority plan from the reach of §8(a)(1) and §8(a)(3), and we turn now to a review of that conclusion.

19. Nevertheless, the Court did not reject the continuing validity of its approach in *Mackay*. In this respect the Court observed (ap pages 2125 – 2126):

The Court of Appeals and respondent rely upon *Mackay* as precluding the result reached by the Board but we are not persuaded. Under the decision in that case an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers. It may be as the Court of Appeals said that “such a replacement policy is obviously discriminatory and may tend to discourage union membership.” But *Mackay* did not deal with super-seniority, with its effects upon all strikers, whether replaced or not, or with its powerful impact upon a strike itself. Because the employer’s interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers does not mean it also outweighs the far greater encroachment resulting from super-seniority in addition to permanent replacement.

We have no intention of questioning the continuing vitality of the *Mackay* rule but we are not prepared to extend it to the situation we have here. To do so would require us to set aside the Board’s considered judgment that the Act and its underlying policy require, in the present context, giving more weight to the harm wrought by super-seniority than to the interest of the employer in operating its plant during the strike by utilizing this particular means of attracting replacements.

We find nothing in the Act or its legislative history to indicate that super-seniority is necessarily an acceptable method of resisting the economic impact of a strike nor do we find anything inconsistent with the result which the Board reached. On the contrary, these sources are wholly consistent with, and lend full support to, the conclusion of the Board.

Section 7 guarantees, and §8(a)(1) protects from employer interference, the rights of employees to engage in concerted activities which, as Congress has indicated, H.R. Rep. No. 245, 80th Cong., 1st Sess. 26, includes the right to strike. Under §8(a)(3), it is unlawful for an employer by discrimination in terms of employment to discourage “membership in any labor organization,” which includes discouraging participation in concerted activities, *Radio Officers v. Labor Board*, 347 U.S. 17, 39-40, 33 LRRM 2417, such as a legitimate strike. *Labor Board v. Wheeling Pipe Line, Inc.*, 229 F.2d 391, 37 LRRM 2403; *Republic Steel Corp. v. Labor Board*, 114 F.2d 820, 7 LRRM 364. Section 13 makes clear that although the strike weapon is not an unqualified right, nothing in the Act except as specifically provided is to be construed to interfere with this means of redress, H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 59, and §2(3) preserves to strikers their unfilled positions and status as employees during the pendency of a strike. S. Rep. No. 573, 74th Cong.,

1st Sess. 6. This repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.

By way of contrast, we again stress that in the facts at hand it is clear the continued employment of more junior employees was intended as a transitional situation and that after the orderly recall of striking employees to the additional positions, the more junior employees would have no more seniority to exercise against striking employees than they would have had had there been no strike. The continued employment of the more junior employees therefore does not share the characteristics of the super-seniority plan employed in *Erie Resistor*. It is simply the by-product of the employer's right to continue to operate during a strike. See *Hallnor Mines Ltd., v. Behie et al.*, [1954] 1 DLR 135 (Ont. H.C.); *SCM (Canada) Limited*, [1967] OLRB Rep. July 372; *Webster & Horsfall (Canada) Ltd. & John S. Grant*, [1969] OLRB Rep. Sept. 780; and *Westroc Industries Limited*, [1981] OLRB Rep. Mar. 381. Seniority, we might add, is essentially a contractual matter which should only attract independent statutory protection when it is being manipulated in an inherently discriminatory manner. See *Bell Canada, Montreal, Quebec and Communication Workers of Canada*, [1981] 2 Can.LRBR 148 (Can.).

20. The complainant relied heavily on *Eastern Provincial Airways Limited and Canadian Airline Pilots' Association*, a decision of the Canada Labour Relations Board (hereinafter referred to as the *EPA* decision). In that case airline pilots struck an employer who in turn hired strike replacement pilots in order to operate during the strike. Ultimately, the impasse between the parties centered on the employer's determination to keep permanently in its employ the pilots it hired during the strike as replacements and the determination of the trade union to secure the return of all its striking members who wished to return to work once the strike was settled. Indeed, the hiring of "permanent" strike replacements figured prominently in the employer's bargaining strategy. Immediately prior to the strike, the employer emphasized that the trade union could not protect the job of striking employees. In a subsequent letter to bargaining unit pilots it pointed out that CP Air had laid off a number of qualified pilots. And, shortly thereafter, it also indicated that it was about to begin to start hiring replacements. A final telex to striking pilots made reference to the *Canadian Pacific Railway and Zambri* case, *supra*, pointing out that the hiring of replacement pilots "seeking stable employment" might result in striking pilots finding themselves on lay-off because there is no available work. The Canada Labour Relations Board characterized the replacements as persons not within the bargaining unit and held that the granting of any status other than temporary to these replacement employees constituted an automatic violation of section 184(3)(a)(vi) of the *Canada Labour Code* in three ways:

- i) The granting of a super-seniority status to these replacements discriminates against and penalizes those employees who participated in a legal strike and attempts to, and may succeed, in dissuading them from so participating; a right conferred upon them by the Code.
- ii) The right to participate in a legal strike is guaranteed by Sections 110(1) and 180(2) of the Code. These sections grant a statutory right to an employee to suspend his service in order to participate in an activity acknowledged and sanctioned by the Code. Once the strike

is over, the employee having declared himself ready to perform work according to the terms and conditions contained in the new collective agreement, it follows that if the employer refuses to reinstate him for the reason that his position has been permanently filled, the withdrawal or suspension of his work or services does not depend any more upon the will of the employee, but upon that of the employer. Yet, that employer cannot refuse to accept the resuming of the services of this employee except for a reason which is not prohibited by the Code. Since the reason in these circumstances is that the services of the striking employee are not required anymore because of the presence of a replacement employee filling his position, it therefore means that the reason of the refusal of the services of the striking employee is illegal, since it is caused by the granting of a permanent status to the replacement employee. The employer is penalizing the striker because he has exercised a right acknowledged and sanctioned by the Code as belonging to him: to participate in a legal strike.

- iii) If, at the end of the strike, the employer refuses to reintegrate the striking pilots by reason of their positions having been filled permanently by replacements who were not in the bargaining unit represented by CALPA, it is contravening Section 184(3)(a)(vi) because it penalizes the strikers who have refused to cross picket lines by discriminating against them as opposed to those employees who, in addition to the replacements from outside, decided to cross the picket lines, for the sole reason that they exercise a right conferred upon them by the Code, under the provisions of Section 184(3)(c).

21. First, it should be noted that the *EPA* decision was not dealing with a claim by striking employees to replace fellow employees who were also in the company's employ at the commencement of the strike. Indeed, there is much comment by the Canada Board on the interests of replacement employees in comparison to striking bargaining unit members. Secondly, we point out that there is no section in the *Canada Labour Code* equivalent to section 73. Hence, it rendered its decision against a relatively "clean slate" and does not provide an appropriate foundation to this complaint under Ontario law. However, because much has been said in this case about the *Mackay* rule and its progeny in Ontario, we do think a number of observations are appropriate. It should be recognized that *Mackay* has little or no application in the context of a lock-out in this jurisdiction. In that context it would be inherently discriminatory. See *Westroc Industries Limited*, *supra*. To this extent the approach in *EPA* has some application. We also have serious doubts that the more refined doctrinal reasoning emanating from the *Mackay* rule has application in the Province of Ontario. For example, we have considerable doubt that more junior employees or strike replacements who having worked during a strike but subsequently laid off for economic reasons can be recalled before more senior striking employees as is the case in the United States. See *Giddings and Lewis, Inc. v. N.L.R.B.*, 110 LRRM 2121 (7th Cir. 1982) and *Randall v. N.L.R.B.*, 111 LRRM 2437 (8th Cir. 1982). In the context of Ontario, and having regard to section 73 of the *Labour Relations Act*, there is a very strong argument that any such continuing distinction between striking employees and those who continued to work over and above the transitional recall problem disclosed in this case should trigger a violation of the Act. As the Board observed in the recent *International Wallcoverings* case, [1983] OLRB Rep. Aug. 1316, the Board in

applying sections 66 and 64 is at times necessarily obligated to engage in a balancing of interests in determining whether the legislation has been violated. We have held on the facts before us that the balance is not in favour of the complainant and grievors. We have, accordingly, refused to infer a discriminatory intent or to find a violation under section 64.

22. For all of these reasons, the complaint is dismissed.

DECISION OF BOARD MEMBER W. F. RUTHERFORD;

1. I join with my colleagues in dismissing this complaint because the result is, unfortunately, correct under the *Labour Relations Act* as it presently exists.

2. In my opinion section 73 of the Act permits an employer to reward employees who choose to return to work while their fellow workers and the union that represents them continue their strike. The return to work of junior employees under section 73 and the subsequent refusal by their employer to lay them off and recall more senior employees after the strike can only lead to further conflict within the bargaining unit. This use of section 73 of the Act encourages strike breaking and for that reason is unfair and inconsistent with harmonious labour relations. Section 73 provides some protection to employees when they know they are losing a strike and is necessary for that purpose. (See *Beckers Milk Limited*, [1977] OLRB Rep. Dec. 797.) However, to permit an employer to provide greater job security to junior employees if they return to work during a strike is, in effect, punishing employees who continued to strike for exercising their rights under the Act.

3. The approach of the Canada Labour Relations Board in the *Eastern Provincial Airways* decision recognizes that employers cannot get away with enticing employees to work during a strike. While our Board would not permit employer discrimination against employees by reason of their participation in a strike, the result in this case, which puts the burden of unemployment on only those workers who continued the strike and not on the junior employees who decided to return to work is simply not fair.

0333-83-U The Mount Nemo Truckers Association, Local 566, Affiliates of the United Cement, Lime & Gypsum Workers International Union, ALF-CIO-CLC, Complainant, v. **Nelson Quarry Operation of Genstar Stone Products Inc.**, and Torres Transport Limited, Respondents

Arbitration – Interference in Trade Unions – Practice and Procedure – Unfair Labour Practice – Complaint of unit work being given to outside firms in attempt to undermine union – Board not deferring to arbitration where scheme to destroy union alleged – Board refusing to inquire into alleged unlawful conduct occurring 18 months previously to complaint date

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members
W. F. Rutherford and R. J. Swenor.

APPEARANCES: *L. E. Fingold and Ed Mattocks for the applicant; G. Grossman, M. D. Contini, D. L. Barnes and H. E. Macpherson for Nelson Quarry Operation of Genstar Stone Products Inc.*

DECISION OF THE BOARD; September 13, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a violation of sections 3, 64, 66 and 70 of the Act on the part of the two respondents. These sections of the Act provide as follows:

[Section 3, 64, 66 and 70 omitted]

3. On or about February 22, 1977, the applicant trade union was certified as the bargaining agent for a unit of truckers in the employ of “Nelson Crushed Stone, a Division of Genstar Stone Products Inc., a Division of Genstar Corporation”. This employer now goes under the name of “Nelson Quarry Operation of Genstar Stone Products Inc.”. For ease of reference this firm will henceforth be referred to simply as “Nelson”. The employees in the bargaining unit represented by the trade union are dependant contractor drivers who haul crushed stone and other material for Nelson. Torres Transport Limited (“Torres”) is a firm which hauled material for Nelson prior to the union’s certification, and continues to do so. Employees of Torres are not represented by the complainant trade union.

4. The essence of the complaint is that since the certification of the union, and continuing to date, Nelson has been seeking to “undermine and destroy the union” by giving work which would otherwise have gone to members of the union to “outside” firms, most notably Torres. Nelson objects to the Board entertaining the merits of the complaint on two separate grounds. The first ground relates to the time span covered by the particulars filed in support of the complaint, some of which go back to the early 1970’s. The second ground relates to the claim that the issues covered by the complaint can and should be dealt with by way of the grievance – arbitration procedure set forth in a subsisting collective agreement between Nelson and the union. In support of this position, Nelson points to the fact that the union and its members filed numerous grievances under the collective agreement relating to the assignment of work, although none of the grievances were ever processed to arbitration.

5. We propose to deal first with the claim that the issues covered by the complaint are matters appropriately left to arbitration under the collective agreement. The collective agreement, which runs from February 8, 1982 through to February 7, 1984, contains the following provision with respect to the assignment of work:

“RE: SINGLE AXLE, TRAILER AND TANDEM DELIVERIES

(Where the Company pays the trucker for hauling)

5.05 The Company shall not contract out to brokers any single axle or tandem deliveries to its customers if such deliveries can be immediately performed by members of the bargaining unit and if such contracting out would lead to the lay off of a member of the bargaining unit.

5.06 This provision is subject to such a member of the bargaining unit being willing to perform the above deliveries and possessing equipment suitable to the Company's requirement.

5.07 Any member of the bargaining unit with the permission of the Company may purchase a trailer provided this shall in no manner be considered a guarantee of work for such member.

5.08 The Company may bring in trailers outside the bargaining unit to effect its trailer deliveries. However, where trailers belonging to members of the bargaining unit are immediately available at the going trailer rate on a given job, the Company will give preference to such trailers. Once an initial allocation for a job is made by the Company, the trailers so allocated have preference for such job.”

6. The union acknowledges that it and its members have over the years filed numerous grievances alleging that Nelson violated the collective agreement by the manner in which it has allocated work. In its complaint the union referred to the grievances as follows:

“The union has filed a large number of grievances protesting the tactics of the company which are effectively depriving the members of the bargaining unit of an opportunity to earn a livelihood. The company has refused to discuss the grievances with a view to resolving the situation. The sole goal and purpose of the company is to “starve” the bargaining unit of work, and thereby ensure the eventual destruction of the union.”

In a letter dated June 10, 1983 particularizing certain matters alleged in the complaint, union counsel further commented on the grievances as follows:

“There have been 50 or more grievances filed in the last two years. The company always denies the information. All of the complaints relate to a discrimination matter between union and non-union drivers.”

At the hearing, counsel for the union contended that the primary reason why the union had not arbitrated any of the grievances was because after the filing of each grievance, manage-

ment generally improved its performance, although subsequently management always “slipped back” to its old ways. Counsel further contended that although the manner in which Nelson has been assigning work is, in the view of the union, in contravention of article 5.05 of the collective agreement, the arbitration process could not get at the root of the problem in that the actions of the company form part of a “grand scheme” to get rid of the union.

7. Section 89 of the Act gives to the Board a discretion to refuse to inquire into a complaint under the Act. The Board has at times exercised this discretion and refused to hear a complaint where the subject matter involved could also be dealt with by way of arbitration. Nelson would have the Board adopt such a procedure in this case and defer to the arbitration process. In our view, it is generally appropriate for the Board to defer to arbitration where a complaint alleging a violation of the Act primarily relates to a contractual difference between the parties. Indeed, from a reading of sections 44 and 45 of the Act, it is clear that the Legislature intended that matters primarily related to the interpretation and administration of collective agreements be settled through the arbitration process. However, where an employer is alleged to have engaged in conduct which may involve a repudiation of the substantive rights and protections granted to employees and trade unions under the Act, we are satisfied that the Board should not defer to arbitration but instead itself hear the complaint. See: *Valdi Inc.* [1980] OLRB Rep. Aug. 1254. In the instant case, the trade union’s allegation that Nelson is engaging in a scheme to rid itself of the union raises issues concerning the rights granted to trade unions and employees under the Act. In the result, we are satisfied that the Board should inquire into the complaint. We would stress that the thrust of the Board’s inquiry will be into the alleged violation of the Act, not the merits of various grievances alleging a violation of the collective agreement. In particular, it will not be open to the union to seek to utilize the complaint in order to revive the various grievances which it and its members have filed and then apparently abandoned over the years.

8. We turn now to deal with Nelson’s contention that the particulars being relied on by the company go back too far in time. There is attached to the complaint a Schedule “A” containing some ten typed pages of particulars relating specifically to this complaint. These particulars are expanded on in a four page letter dated June 10, 1983. A number of the particulars in schedule “A” relate to events alleged to have occurred prior to the union’s certification in 1977. For example, paragraph 13 of appendix “A” states:

“On an evening in September of 1974, Torres admitted to Emilio Campea that Torres Transport Limited was effectively in partnership with Nelson Crushed Stone.”

In addition there are a number of particulars relating to alleged activities that the union claims were engaged in over a period of time, but then stopped some years ago. For example, paragraph 9(h) of Appendix “A” as supplemented by the letter of June 10, 1983 alleges as follows:

“The management of Nelson Crushed Stone have given the inside workers of the quarry the instruction to always load Torres Trucks first.”

“Yard foremen such as Doug Styles and Art Murray gave these instructions to the inside workers throughout the period of 1974 to 1979.”

Certain of the particulars do relate to more recent events and refer to dates in 1981 and 1982. The last date specifically referred to in Appendix "A" deals with an incident alleged to have occurred on December 10, 1982, while the letter of June 13, 1983 refers to an incident alleged to have occurred "8 to 10 weeks ago".

9. Quite apart from the Appendix "A" to the complaint and the letter of June 13, 1983, there was also attached to the complaint a copy of a complaint apparently prepared by the complainant trade union in May of 1980. This 1980 complaint, which contains ten pages of *additional* particulars, alleges that in 1980 Nelson was bargaining in bad faith with respect to certain job security provisions which the union was then seeking to include in a collective agreement. This complaint was apparently not filed with the Board in 1980, but is now being put before the Board for the first time.

10. Counsel for the union contends that the particulars filed in support of the complaint stretch so far back in time so as to illustrate the historical development of the relationship between the parties. Counsel also stressed that many particulars relate to events alleged to have occurred in 1982, and pointed as well to the events of "8 to 10 weeks ago" referred to in the letter of June 13, 1983.

11. The Board has taken the position that parties should act with promptness in raising allegations of wrongdoing, and further that a failure to do so may result in the Board refusing to hear the allegations. The Board commented on this as follows in *Re: The Corporation of the City of Mississauga* [1982] OLRB Rep. March 420:

"20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once chrysalized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it – including the employees – are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay – holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board

must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship – quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an on-going collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years."

12. In our view it would be both unfair and unreasonable to require that company representatives now address themselves for the first time to events alleged to have occurred some years ago. This, along with the industrial relations policy considerations expressed in *The City of Mississauga* case respecting the need to raise complaints within a reasonable time period, lead us to conclude that the Board should exercise its discretion under section 89 of the Act and not inquire into any allegations of improper or unlawful conduct alleged to have occurred prior to the 18 month period immediately preceding the filing of the complaint, that is prior to November 13, 1981. Once the Board has heard the evidence and representations of the parties with respect to the merits of the complaint, and assuming a violation of the Act is made out, the Board will decide whether it would be appropriate to actually grant remedial relief for the entire 18 month period, or whether some lesser period might be more appropriate.

13. The matter is referred to the Registrar to be re-listed for hearing.

1934-82-U Canadian Union of Public Employees, C.L.C., Ontario Hydro Employees' Union, Local 1000, Complainant, v. Ontario Hydro, Respondent.

Change in Working Conditions – Unfair Labour Practice – Evidence of incidents where no discipline imposed where false claims for subsidy detected – Practice of progressive discipline – Just clause provision of expired agreement in force during freeze period – Discharge of grievor for similar conduct breach of freeze provision

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *C. M. Mitchell for the complainant; Janice Baker and J. Knight for the respondent.*

DECISION OF THE R. O. MacDOWELL, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; September 13, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that there has been a breach of sections 64, 66, 70 and 79 of the Act. The complaint arises from the discharge of Diane Hachey ("the grievor") on or about December 22, 1982. Because the basis for this proceeding is a little unusual, it may be useful to deal with this matter at the outset.

2. The grievor is one of a number of clerical employees working in the construction field forces of Hydro's Generation Projects Division and in the Lines and Stations Construction Department of the Transmission Systems Division. For some years these employees were represented by the Office and Professional Employees' International Union ("OPEIU"). The most recent collective agreement between Ontario Hydro and the OPEIU ran from April 1, 1980 to March 31, 1982. However, on March 11, 1982, an application was brought to terminate the OPEIU's bargaining rights and on June 21, 1982, there was a decision of the Board to that effect. Almost immediately, on June 24, 1982, the Canadian Union of Public Employees, Local 1000 (which represents most of Ontario Hydro's operations employees) applied for certification as bargaining agent for the employees formerly represented by the OPEIU. An interim certificate was issued by the Board on July 29, 1982, and notice to bargain was given on that date. The effect of this sequence of events was to trigger the "statutory freeze" provisions of the Act which read as follows:

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

- (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
- (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 53 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 44 applies with necessary modifications thereto.

3. The effect of section 79 is to preserve the framework of the employer-employee relationship, in its entirety, until the freeze is ended in accordance with the terms of the statute. That framework can be determined by reference to the terms and conditions of employment and employee rights set out in the expired collective agreement, together with such other rights, privileges, or duties extrinsic to the agreement which can be reasonably demonstrated to be an accepted part of the employer-employee relationship. For example, in *Scarborough Centenary Hospital*, [1978] OLRB Rep. July 679, the Board was satisfied that free parking was an employee privilege which could not be withdrawn during the currency of the statutory freeze even though free parking was not a term of the expired collective agreement. In the instant case, the terms of the relationship between Ontario Hydro and the grievor – still frozen at the time of her discharge – can be gleaned from the following provisions of the collective agreement and from excerpts from the employer's written policies respecting the employees' working conditions:

Article 6

GRIEVANCE PROCEDURE

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- 6.8 Any allegation that an employee with less than six (6) months' service has been demoted, suspended, discharged or otherwise disciplined without just cause shall be a fit matter for the grievance procedure only.

A GUIDE TO WORKING CONDITIONS

The following has been compiled from the Management Guide, Field Instructions – Design and Construction, and other appropriate documents to service as a basis for administration of working conditions which apply to Continuing Construction Office Employees of the Construction Field Forces represented by the OPEIU. These working conditions will apply to all such employees, except as identified where a qualifying period of 6 months' employment is required.

SAFETY SHOES AND EYE PROTECTION

I SAFETY SHOES

On types of work where foot injuries are likely to occur, the wearing of safety shoes (with steel toe inserts) is to be encouraged. Employees who purchase such safety shoes or boots will be reimbursed 50% or one-half of the cost up to a maximum reimbursement of \$40.00 (effective April 1, 1981 – \$50.00) per pair.

1. A limit of two pairs of safety shoes or boots per person will be subsidized in a twelve-month period. It will be necessary for the appropriate Managers or supervisors to arrange payment procedures and to control authorization of the subsidy.
2. The subsidy should be made available only to employees who are exposed to foot injuries during the course of their work and for footwear appropriate for the job concerned. Employees upon surrender of a receipt for the purchase of a pair of safety shoes from a regular supplier of such shoes will be reimbursed in accordance with the aforementioned procedure.

CORRECTIVE DISCIPLINE

It is expected that all employees recognize the value of the necessity for self-discipline, but, in its absence, those held responsible for employee behaviour must undertake corrective disciplinary measures.

Employees who violate rules or recognized conditions of employment (regular attendance, reporting on time, obeying instructions, observance of safety rules, proper use of equipment and materials, etc.) must expect disciplinary penalties.

Although employees will normally respond to verbal or written warnings, the degree of violation will dictate the action which a supervisor should take to achieve the purpose of corrective discipline. Supervisory staff, in deciding what action to take, and to ensure reasonably consistent and uniform practice should apply one of the disciplinary penalties in the undernoted list for each infraction, taking all matters into consideration, including any previous disciplinary action, if relevant:

Verbal warning from the immediate supervisor.

Written warning from the immediate supervisor.

Written warning from the supervisor next above with a copy to Union Steward or Chief Steward.

Suspension with loss of pay up to a maximum of three days. Suspension to be confirmed in writing with a copy to Union Steward or Chief Steward.

Termination of employment.

In each instance of written warning, notice of suspension or termination, two copies must be forwarded to Head Office, *attention the appropriate Senior Personnel Officer*.

Where possible, suspension with loss of pay should be applied to mid-week days.

Ontario Hydro does not dispute that, save perhaps in the case of employees with less than six months' service, a regular employee cannot be discharged without just cause. The union argues that implicit in the requirement of just cause and confirmed by both the arbitral jurisprudence and the employer's policy statement is the notion of "progressive" or "corrective" discipline. [See generally Brown & Beatty *Canadian Labour Arbitration* 1977 Canada Law Book Toronto at p.381 and section 44(9) of the Act].

4. In accordance with the employer's established policy set out above, employees who are exposed to foot injuries during the course of their work are entitled to a subsidy on two pairs of safety boots in any twelve-month period. The grievor was discharged when she applied for the subsidy for two pairs of boots which she purchased for her husband and her son. The circumstances preceding that termination are not substantially in dispute.

5. The grievor is a clerk in the costing department and in the course of her work is occasionally required to wear safety boots. Such boots are supplied by an outside company whose truck visits the site from time to time. In November, 1982, the grievor decided that

she needed new boots and went to the truck for the purpose of buying them. The grievor did not see any that she liked, but knowing that she was entitled to two pairs of subsidized boots per year, she purchased one pair each for her husband and her son. An invoice in the sum of \$124.01 was then sent to the payroll department, which would arrange for payment of one half of the amount by Ontario Hydro and the deduction of the other half from the grievor's paycheque. Because the amount was higher than usual, the grievor went to the payroll department to arrange for the deduction to be made over two pay periods. The invoice bears the complainant's name, clock number and signature, and clearly indicates that she purchased two pairs of boots. No effort was made to conceal it. On the contrary, the grievor had to make special arrangements for payment with the payroll department. Her immediate supervisor (a "lead hand" in the bargaining unit) was also aware of the purchase.

6. Mrs. Hachey testified that at the time she purchased the two pairs of boots and "put in" for the subsidy, she did not know that she was doing anything wrong. We cannot fully accept that contention. It must have been obvious to her, had she turned her mind to it, that the purpose of the subsidy was to partially defray the expense of safety equipment which employees might require by reason of the nature of their work. It is not a gratuitous benefit conferred upon the employee's family or friends. On the other hand, we are also satisfied that Mrs. Hachey simply did not give the matter much thought or appreciate that her conduct might be regarded as a serious breach of her employment obligations. She certainly did not anticipate her employer's response, nor is her conduct consistent with that of an individual knowingly and willfully engaged in a scheme to defraud her employer. On the contrary, it appears that she had some vague notion of a presumptive right to two pairs of subsidized boots per year and decided to take advantage of that subsidy for her relatives when she could not do so directly for herself. There was nothing calculated or conspiratorial about her conduct, however thoughtless, ill-advised, or foolish it may have been.

7. The grievor's conduct came to the attention of management as part of a routine check of the invoices submitted for payment. Apparently, what caught the employer's eye was the fact that the grievor had purchased two pairs of boots at once. Garry Sullivan, one of Hydro's cost accountants, explained that there is no clerical or accounting check on the payment of the subsidy other than to ensure that employees do not claim more than two payments per year. Sullivan testified that if employees put in for payment in respect of a third pair of boots, they are required to pay for the boots themselves. Likewise, if a claim is made by an individual who is not entitled to the subsidy at all (i.e., because his job does not require safety boots) the claim is rejected. In neither case is the claim treated as fraud or attempted fraud. Further, so long as the employees never claim a subsidy on more than two pairs of boots per year, there is no check to ensure that the boots purchased are solely for the employee's personal use. In the circumstances, it is not surprising that employees, like the grievor, might look upon the payment of a subsidy on two pairs of boots per year as a kind of presumptive right.

8. When the grievor's purchase came to his attention, Sullivan called the grievor to his office to discuss the matter. The grievor told Sullivan that she needed boots in her work but she readily admitted that, in this case, she had purchased boots for her son and her husband. When asked if she realized that it was wrong and that this was not the intent of the subsidy, the grievor acknowledged that she did.

9. Subsequently, Sullivan discussed the matter with George Battye, the project ac-

Accountant at Pickering. Sullivan, Battye and Jim Ella, a personnel officer for Hydro's construction employees, met the grievor the following day. They were of the view that the grievor's conduct was equivalent to theft or fraud and warranted summary discharge.

10. The meeting was brief but tense. Throughout the meeting the grievor was white-faced and shaken. She again admitted the circumstances in which the boots were purchased, admitted that she now knew that it was wrong, and offered to pay for them. She was distraught and told the employer representative that she had never been involved in anything like this before. In her eight years of service with the employer, she had never done anything which would warrant discipline, let alone discharge. Battye advised her, however, that he considered her conduct the equivalent of theft or fraud and that, as a result, she had only two choices: she could sign a letter of resignation which had been prepared prior to the meeting and was immediately presented to her for signature, or she would be discharged immediately "for cause" in accordance with the terms of the (expired) collective agreement. Battye told her that if she took the latter alternative and refused to sign the letter of resignation, her case would be referred to the employer's legal department which would consider pressing criminal charges against her. The grievor was frightened. She signed the letter of resignation which the employer representatives had presented to her. She then went back to her desk, packed, and left the premises.

11. Later that day the grievor discussed her situation with her trade union representative who undertook to see what he could do. The following morning she delivered a letter to Jim Ella framed as follows:

I wish to retract my resignation of December 22, 1982, since I was coerced to sign it and was not made aware of my rights as an employee.

On December 24, 1982, Ella made the following reply:

We are in receipt of your letter of December 23, 1982 in which you indicated your wish to retract your resignation of December 22, 1982.

We regret that we are not prepared to accept your retraction and consider your employment with Ontario Hydro terminated effective noon December 22, 1982.

12. At the hearing before this Board, counsel for the employer indicated that it was not intending to rely on the resignation; rather, it was content to argue the case on the basis that it was a "discharge" and that the employer had "just cause". This was the allegation contained in the grievor's section 89 complaint dated January 14, 1983. At paragraph four of that complaint it is alleged that:

On or about December 22, 1982 the grievor was dealt with by Jim Ella, Assistant Personnel Officer, Gary Sullivan, Supervisor, and George Battye [sic], Project Accountant, of the respondent contrary to the provisions of sections 64, 66, 70, and 79 of the Labour Relations Act in that they did on their own behalf or on behalf of the respondent discharge the grievor without just cause and, more particularly, contrary to the corrective discipline procedures pre-established by the respondent employer.

13. At the hearing the complaint was narrowed to an alleged breach of section 79 of the Act. The Board also heard the evidence of Eefje MacLean and Teresa McGhee, two employees in the same clerical bargaining unit as the grievor who work at the Bruce Generating Station Project. Ms. MacLean has worked for the company for twelve years. Like the grievor, she is entitled to the safety boot subsidy. In December, 1979, she and a number of other employees approached the safety supply truck to buy safety shoes. Ms. MacLean said that she understood she was entitled to two pair of boots per year and, having not exhausted this limit, purchased a pair of safety boots for her son and put in for the subsidy. So did Teresa McGhee. She has also worked for Hydro for several years.

14. Both employees testified that their actions were common-place and that the December, 1979 incident involved several other employees. As in the grievor's case, the employer discovered what had happened and told the employees that it was an abuse of the subsidy system to claim payment for boots purchased for someone else. Unlike the grievor's case, however, no one was disciplined or discharged. There was no formal disciplinary action at all. The employees were given the option of returning the boots or paying the full price. Ms. MacLean kept the boots she had purchased and Ms. McGhee returned hers. Mr. Battye testified that at the time he decided to discharge the grievor he had no knowledge of how problems like the grievor's had been dealt with in the past, nor did he give any consideration to the grievor's eight years' service, or the fact that she had never been disciplined before. In Battye's mind, her conduct was equivalent to theft, and on a construction site theft warrants immediate discharge. He did not consider the application of the employer's corrective discipline policy.

15. The Board also had before it the following memo produced by the union, and put before the Board on the consent of counsel. It is directed to read as follows:

On November 25, 1982 you submitted an expense report to me asking for \$50.00 towards a pair of safety boots as per Collective Agreement part A Item 44.0(5)iii.

On December 1, 1982 you were asked to explain the details concerning the expense. You indicated that you had indeed purchased safety (hiking) boots as described. You said you had asked the vendor to order these for you and they did so. However, a routine Management follow-up indicates the vendor does not stock nor have [sic] access to items such as "steel toed hiking boots", particularly at a cost of \$175.00. Also the Store Clerk has informed us of your request to alter the receipt for your actual purchase. You later admitted that you indeed purchased hockey skates.

Using this receipt to claim a safety shoe subsidy is a direct attempt to obtain funds under false pretences. Ontario Hydro does not contribute towards the purchase of items other than safety shoes or boots. Worse than that, you deliberately made a false statement on your expense report.

Severe disciplinary action is warranted. However, this is your first offense, and your conduct at work is good except for this one incident. Therefore, the only action at this time will be a disciplinary suspension

of 4 days without pay. These days will be December 7, 8, 9 and 10, 1982.

You are being given this disciplinary action in the hope that you will correct your behaviour and you will improve. Defrauding or attempting to defraud your employer is a very serious offence. Any future departure from Ontario Hydro procedures or poor work performance will subject yourself to further disciplinary action up to and including termination.

J. Kaminski

Shift Operating Supervisor

Bruce N.G.S.A.

16. This letter was introduced on the second day of hearing (some weeks after the first) and confirms the recollection of Bill Little, a steward at the Pickering site, who testified on the first day he told the Board that he had heard of the case described in the memo and the four-day suspension. Both Little's testimony and the document are hearsay, of course, but we note that the memorandum appears on Ontario Hydro's printed letterhead and no effort was made by the employer to deny the validity of the document or its contents. It would appear, therefore, that in the case of the clerks, a situation virtually identical to that of the grievor resulted in no discipline at all, and in the case of another individual whose purported offense was more serious than that of the grievor, only a short suspension was issued. The respondent advanced no evidence to explain why some clerical employees caught "cheating" on the safety boot subsidy were not disciplined at all, while the grievor, guilty of the same offence, was fired.

17. The union argues firstly, as it did at the opening of the hearing, that the matter was initially treated by the employer as a resignation, and that Hydro cannot now reformulate its theory of the case and argue that it is a discharge for which there is just cause. The union argues that since the resignation was involuntary, it is of no force and affect and that, therefore, the grievor was not properly terminated. We did not accept this submission when it was first raised in a preliminary way, and we do not do so now.

18. We acknowledge that the integrity of an employer's actions may be thrown into question when it seeks to change the grounds on which it initially dealt with an employee. If an employer raises new reasons for terminating an employee in order to have its initial actions upheld, an arbitrator may well wonder whether the company would have acted in the way that it did, if it had directed its attention to these matters at the time the action was first taken. Moreover, a party ought to know the case that it has to meet prior to the hearing, and should not be prejudiced by surprise developments of which it had no previous notice. A party might not have committed the time, effort and money to pursue a legal proceeding if it had known the facts and arguments relied upon by the other side. However, in the circumstances of this case, it is our view that it would be entirely too technical to construe the grievor's situation as a simple resignation or voluntary quit - which it obviously was not. Nor was the union in any way surprised or prejudiced by the alternative way in which the employer characterized its case and chose to proceed before this Board. We note, as counsel for the employer pointed out, that from the very start of this proceeding the union itself characterized

the treatment of the grievor as an "unjust discharge", and we are content to regard it in that way. We note further that it was the protection from unjust discharge and the obligation to apply progressive discipline which were part of the "frozen" terms and conditions of employment preserved by section 79 of the Act and that it is an alleged breach of those conditions which is before us for consideration.

19. For many years arbitrators have been dealing with cases in which various kinds of employee misconduct were said to provide "just cause" for discharge. Thus, although this Board is not sitting as a board of arbitration, we have found the arbitral approach to employee dishonesty to be a useful starting point. In that context one must recognize the substantial weight of arbitral opinion to the effect that acts of dishonesty or untrustworthiness ordinarily justify termination. Many arbitrators submit, and we agree, that trust and respect between employer and employee are the corner stones necessary to support a viable and healthy employment relationship. In the case of theft or the falsification of production records, many arbitrators have been reluctant to reverse a discharge penalty even though the monetary sums involved may be rather small. Such misconduct strikes at the very heart of the relationship. Indeed, it has been held that previous warnings or progressive discipline may be unnecessary and that discharge is appropriate even in the case of senior employees with many years of service. This arbitral concern has been succinctly stated by the board of arbitration in *Re Phillips Cables Ltd. and International Union of Electrical, Radio and Machine Workers, Local 510* (1974), 6 L.A.C. (2nd) 35 at page 36:

...In a very general sense honesty is a touch stone to viable employer-employee relationships. If employees must be constantly watched to ensure that they honestly report their comings and goings, or to ensure that valuable tools, material, and equipment are not stolen, the industrial enterprise will soon be operated on the model of a penal institution. In other words, employee good faith and honesty is one important ingredient to both industrial democracy and the fostering of a more co-operative labour relations climate.

The Board feels that these are the sentiments underlying the arbitral castigation of dishonest conduct. Arbitrators are not equating the role of a plant to that of a church. Rather, they are ensuring that the role of the plant will not evolve into a role resembling that of a penal institution...

20. *Phillips Cables* involved the falsification of production records and employee abuse of an incentive wage payment system but, in some respects, some of the remarks of the board of arbitration are equally applicable to the claim for benefits to which one is not entitled. At page 37 the Board commented:

An incentive system depends upon the honesty and good faith of the employees who must operate it. When a few employees start to cheat, other employees will feel aggrieved. But, rather than report their fellow workers to management, they may themselves prefer to cheat. Gradually, deviant behaviour becomes the norm and, as illustrated by Cox's testimony, [presumably, that "everyone was doing it"] this norm can even evolve into a sense of right.

There is some indication that that is what has happened in this case. All of the union witnesses suggested that it was common practice for employees to "use up" their boot allowance, whether or not they personally needed new safety boots. The subsidy claim on two boots per year came to be regarded as a right, even when the boots were purchased by someone else, and, upon reflection, any reasonable employer would have recognized that this was not the intent of the subsidy. The absence of controls made this abuse relatively easy, and suggests that the employer was not unduly concerned about the possibility; however, by the same token, an employer should be entitled to assume that its employees are honest until they demonstrate otherwise, and should not have to develop elaborate procedures to catch those who cheat.

21. If the employer in this case had a clearly established and consistent practice of dealing harshly with persons who claim benefits to which they may not be entitled, there would be a strong argument for concluding that a discharge was within the realm of reasonable employer responses and that, accordingly, the grievor's discharge was not "unjust". But that is simply not the case. Although the evidence is not as complete as it might be, it stands uncontradicted, and demonstrates that conduct similar to that of the grievor's was not punished at all, and what appears to be a more serious situation resulted in a short suspension. Moreover, Jim Ella testified that there were examples of employees improperly claiming "board allowance", and as in the case of the boot subsidy claim by Teresa McGhee and Eefye MacLean, the employees involved were simply required to pay the money back. Employees putting in a claim for a benefit to which they were not entitled were not disciplined and certainly were not discharged. Against that background, the grievor's discharge appears inconsistent, disproportionate, and patently unfair. While arbitrators have given an employer a fairly wide latitude in responding to employee dishonesty, they have also generally been sensitive to the basic principle that similar cases must be treated in a like fashion. This merely reflects a universal precept of fairness and justice, for whatever interpretive difficulties surround the application of the concept of just cause to particularly cases, it is manifestly unjust for one employee to be fired while another is only admonished for essentially the same conduct. And in assessing the reasonableness of the sanction actually imposed, arbitrators have regarded the penalties imposed by the employer in similar circumstances in the past as tending to reveal the actual concern that management has for such behaviour. Here, apart from the grievor's case, there does not seem to have been substantial concern in like cases in the past.

22. These general considerations are reinforced by certain of the other circumstances established by the evidence. The grievor has eight years of satisfactory service and no previous disciplinary record at all. The incident in November, 1982 is an isolated event in an otherwise unblemished career. The grievor did not try to conceal her actions, immediately admitted that she knew she had acted improperly, and offered to make restitution – an offer which, we repeat, was all that was required of McGhee and MacLean in a similar situation. The circumstances here simply do not demonstrate that the grievor has shown herself to be so untrustworthy that the employer can never again rely on her or that, in all the circumstances, this solitary transgression provides "just cause" for discharge. In our view, the employer should have considered and applied its own established policy of progressive discipline set out above. We do not think that the case of a long-term clerical employee such as the grievor can be compared to that of a construction worker who steals tools or material from a construction site. While we do not doubt that Mr. Battye and his colleagues were acting in good faith and were not intentionally discriminating against the grievor, nevertheless, the result of their deliberations is clearly unfair. We find, therefore, that the grievor has been unjustly dis-

charged, that the employer has not applied its policy of progressive discipline as it should have done, and that, consequently, there has been a breach of section 79 of the *Labour Relations Act*.

23. Section 89(4) of the *Labour Relations Act* gives the Board a broad authority to rectify the effects of a breach of the Act. In this case, it is our view that the appropriate remedy requires not only that the Board declare that the grievor has been unjustly discharged, but also a direction that she be reinstated in employment and compensated for the wages and benefits lost by reason of that unjust discharge. However, in our view, the amount of compensation cannot and should not completely indemnify her for her losses. In the first place, while a discharge was manifestly unjust in the grievor's case, a three-day suspension in accordance with the established policy concerning corrective discipline would not have been an inappropriate response. The grievor's compensation entitlement should not include an amount in respect of this period of time. In addition, on February 7, 1983, this proceeding was adjourned *sine die* on the agreement of the parties and the express understanding that the respondent employer would not be responsible for any additional liability that might arise as a result of the postponement of the hearing. Accordingly, the complainant should receive no compensation for the period between February 7, 1983, when the matter was adjourned, and April 11, 1983, when it came on for a hearing once again. With these qualifications then, the Board directs that:

- a) the grievor be reinstated forthwith to her former position; and
- b) the grievor be fully compensated for all wages and benefits lost by reason of her unjust discharge other than those mentioned above. Such compensation shall bear interest calculated in the manner set out in practice note 19.

24. The decision of Board Member J. A. Ronson will follow.

0410-83-M The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada on its own behalf and on behalf of Local Union 527, Applicant, v. The Electrical Power Systems Construction Association and **Ontario Hydro**, Respondent

Construction Industry Grievance – Employee receiving overpayment of \$4,578.00 – Terminated for refusing to repay amount of overpayment – Employee not in any degree responsible for error – Employer required to give employee reasonable opportunity to pay back before exercising disciplinary powers – No just cause for discharge

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

APPEARANCES: *Alex Ahee and Jack Porter for the applicant; W. J. Hayter, I. A. Starasts and T. D. McKee for the respondent.*

DECISION OF THE BOARD; September 13, 1983

1. This is the referral of a grievance to arbitration by the Board pursuant to the provisions of section 124 of the *Labour Relations Act*. It involves the discharge on March 7, 1983 of Mr. John Forbes, a pipefitter at the Bruce Generating Station construction site, and the issue is whether the respondent, Ontario Hydro, had “just cause” for the discharge.

2. It is not disputed that Mr. Forbes was in receipt of an overpayment on room and board allowance for the period September 1981 to December 1982. The amount of that overpayment was \$4,578.00. The evidence of the respondent’s Personnel Manager, Mr. McKee, is that Mr. Forbes was terminated solely for refusing to repay the money that he owed. While counsel for the respondent did not abandon the position that Mr. Forbes was less than innocent in the matter of his overpayment, neither was it a position that he strenuously pressed.

3. Mr. Forbes had begun his most recent period of employment with Hydro in July of 1981, and at the time was still maintaining his wife and child in the family home in D’Es-cousse, Nova Scotia. He was accordingly entitled to and received room and board allowance under the pertinent provisions of his collective agreement. The relevant portion of the collective agreement is found in Article 28.2, and reads:

- (i) When an employee’s regular residence is more than 97 radius kilometres from the Project, he shall be paid a subsistence allowance of \$26.00 per day for each day worked or reported for.

“Regular residence” is then defined as follows:

An employee’s “regular residence” is the place where he maintains a permanent self-contained domestic establishment (a dwelling house, apartment or similar place of residence where a person generally sleeps and eats) in which he resides, and for which he can show proof of financial commitment.

For the purpose of his employment at Bruce, Mr. Forbes had rented premises in the Town of Ripley, Ontario, which is within the 97-kilometre zone of the Project. The parties have always interpreted the collective agreement to mean that as long as an employee like Mr. Forbes maintains a residence for his family outside the 97-kilometre zone, he is entitled to the room and board allowance. The very provision of a room and board allowance contemplates that the employee himself will take up temporary residence within the 97-kilometre zone for the purpose of his employment. If his family subsequently joins him at the premises located within the prescribed zone, however, the employee's continued entitlement, according to the practice developed by Hydro, depends on whether the family's cohabitation is "temporary" or is "permanent". There appears to have been no precise definition developed as to what is "temporary", but reference of the company's witnesses appeared to be to a period of one or two months. In any event, Hydro continues the employee's full room and board allowance if, in the opinion of Hydro, the cohabitation of the family at the new premises is only "temporary". If the family has moved up "permanently" on the other hand, the entitlement to room and board ceases, and the employee becomes entitled only to a "travel allowance" provided for in Article 28.1 of the collective agreement. What causes confusion is that, while Hydro makes this accommodation under the collective agreement with respect to purely "temporary" changes in the residence of an employee's family, the Ministry of National Revenue, for the purposes of taxability of the allowance under the *Income Tax Act*, does not. In other words, an employee living away from home for the purpose of pursuing his employment at the Hydro job site receives a tax-free room and board allowance under the collective agreement. If his family subsequently joins him for a "temporary" period, he continues to receive the room and board allowance from Hydro, but from that point forward on a taxable basis. If the move of the family is "permanent", however, he loses the room and board allowance altogether (and receives instead a taxable travel allowance under the collective agreement).

4. In the case of Mr. Forbes, it was decided that his wife and child would join him in Ripley, once he got settled, and remain with him for the duration of his employment (which would, under Hydro's policy, have disentitled Mr. Forbes to further room and board allowance). Mr. Forbes testified that he had heard that an employee loses his tax-free status on room and board once his family comes to live with him, and that an employee is therefore required to notify the Hydro office when such a change in circumstance takes place. Mr. Forbes accordingly attended at the Hydro office at the site, and spoke to the personnel clerk there, Sharon Smith. According to his testimony, he advised Ms. Smith that his family had now moved up with him to Ripley, and that he wanted to change his tax-free status on room and board. He said that Ms. Smith asked him what he had done with his residence in Nova Scotia, and Mr. Forbes advised her that it was now locked up, and that the telephone had been disconnected. Ms. Smith wrote down all of the particulars from Mr. Forbes on the form which Hydro uses to advise payroll with respect to the room and board allowance. As in the form which had been made out when Mr. Forbes applied for the room and board allowance at the commencement of his employment in August, Mr. Forbes gave his permanent residence as "D'Escousse, Nova Scotia". There is a place next to that on the form to indicate the telephone number for that permanent residence, and Ms. Smith placed a stroke through the space provided (in contrast to Mr. Forbes' original application). To indicate the reason for the new form going in, Ms. Smith wrote on the form: "Wife staying up here". Ms. Smith then gave the completed form to Mr. Forbes to read over, after which Mr. Forbes signed it. Ms. Smith then wrote on the top of the form: "For T4 purposes", and took the form in to the Personnel Manager, Mr. McKee, to receive his signature. Mr. McKee took the words "For T4 purposes" at the top as indicating that the only change was with respect to taxability, and as-

sumed that Ms. Smith had made the necessary inquiries to satisfy herself that the stay of Mr. Forbes' wife was "temporary" only. Ms. Smith then brought the completed form back to Mr. Forbes, and gave him one of the copies. Mr. Forbes testified that he then asked Ms. Smith if he could change his OHIP coverage from "single" to "family", and Ms. Smith indicated that that was done at another office. Ms. Smith's testimony is that she would have initiated that change herself. Mr. Forbes does not recall exactly what he did to arrange the change in OHIP coverage, but the company's own records demonstrate that that change was in fact put through in September, to take effect (after the usual three-month delay) in December.

5. Ms. Smith, for her part, processes a great number of forms similar to the one that she made out for Mr. Forbes, and did not purport to have any recollection of her conversation with Mr. Forbes in particular. It is clear that she was aware of the difference in room and board entitlement, from Hydro's point of view, between a "temporary" move by a wife and a "permanent" one, and testified that Mr. Forbes could not possibly have made it clear that the move in question was a "permanent" one, or she would not have permitted him to fill out a claim for room and board allowance. Rather, she would have explained to him that he was at that point entitled only to the travel allowance under the collective agreement, and would have filled out the appropriate form. Ms. Smith testified that it is not unusual for an employee at the project to have his wife and family come for a visit, particularly during the summer, and to come to the office to advise her of that in order to effect the appropriate income tax change. This, she testified, is what she must have believed was occurring in the present situation. In coming to that conclusion, she says she would have relied on the fact that Mr. Forbes continued to indicate his "permanent" residence as D'Escousse, Nova Scotia, along with the fact that he was still claiming room and board allowance.

6. In December of 1982, some fifteen months later, Hydro began a series of security investigations in a general attempt to verify the entitlement of those employees claiming room and board allowance. At the same time, Hydro "put the word out" through the stewards that employees wrongfully in receipt of the said allowance would be in a better position with Hydro if they came forward and made disclosure, rather than waiting for Hydro to discover them on its own. Mr. Forbes was one of those employees whom Hydro, through a number of inquiries, was specifically investigating. Word of these inquiries came to the attention of Mr. Forbes, and he asked his steward to make an appointment to see Mr. McKee in Personnel. The actual reason for this request, he testified, was that it occurred to him at that point that he might in fact be in a position to revert to tax-free status on his allowance and wished to clarify that with his employer. The basis for this notion, he testified, was that he was at that stage allowing his brother-in-law in Nova Scotia, who had been recently burned out of his own home, to live rent free in Mr. Forbes' vacant house in D'Escousse, until such time as his brother-in-law could work out other arrangements. Mr. Forbes testified that he felt under those circumstances it might once again be said that he was maintaining a "dependent" away from his residence in Ripley, which he took to be the test for determining tax-free status under the income tax regulations.

7. When the meeting with Mr. McKee, Mr. Forbes and his steward, Mr. Morrison, took place, Mr. Forbes explained his situation and inquired about the possibility of reverting to tax-free status on his room and board allowance, but Mr. McKee replied that Mr. Forbes was not entitled to be in receipt of room and board allowance at all. Mr. McKee indicated that the matter could possibly result in either criminal or income tax charges, and instructed Mr. Forbes to immediately fill out a new form changing his claim to that of travel allowance.

Mr. Forbes did so. Mr. McKee then indicated that he was not aware at that moment what the amount of the overpayment to Mr. Forbes had been, but that Hydro would be in touch. Mr. Forbes inquired as to the possibility of some kind of time payments with respect to overpayment, and Mr. McKee responded that there would be no possibility of that. Following that meeting Mr. Forbes received a letter from Mr. McKee dated December 17, 1982, setting out the amount of Mr. Forbes' indebtedness to the company (being \$4,578.00 – the difference between the room and board allowance and the travel allowance over the 15-month period), and giving Mr. Forbes until January 15th to make full restitution.

8. Through Mr. McKee's letter, the case of Mr. Forbes came to the attention of Mr. Mark, the Project Controller. Mr. Mark had recently been involved in collecting overpayments of room and board allowance from other employees on the site, and felt that the time allotted for repayment by Mr. McKee was too generous. He accordingly tried to reach Mr. Forbes by telephone, but learned that Mr. Forbes at that time was in the hospital for an operation. Mr. Mark was finally able to make contact with Mr. Forbes some time in the first week of January, and he indicated to Mr. Forbes that he was moving the deadline for payment up to January 10th. Mr. Forbes protested that he had done everything "above board" with respect to claiming the allowance, and didn't feel he owed the company anything. He then raised the possibility of arriving at some lesser figure in satisfaction of Hydro's claim, to recognize fault on both sides. Mr. Mark, however, indicated that there would be no negotiation on the figure owing. To show his good faith Mr. Forbes says he then went to his bank in Ripley to make arrangements for a loan in the event that it became necessary to repay the amount which Hydro claimed was owing, and on January the 12th, Mr. Forbes sent the following registered letter to Mr. Mark:

DATED JANUARY 12, 1983

ONTARIO HYDRO, DOUGLAS POINT, ONT.

ATTENTION: MR. G. MARK

This is to inform you of the steps I have taken concerning my Board Allowance claim.

No. 1, I have opened a separate in trust account, in the event that I am found partially at fault.

No. 2, I have submitted all documents to a third party Mediator.

Sincerely yours,

"John M. Forbes"

The "third party mediator" to whom Mr. Forbes referred the matter was the Ontario Ombudsman.

9. Mr. Forbes returned to work from his convalescence on January 24th. A further meeting was held with him on that day, and he was given until January 26th to pay. On January 26th, Mr. Forbes was stopped by his foreman as he attempted to report for work. The

foreman asked Mr. Forbes if he had a cheque for Hydro, and Mr. Forbes replied that he did not. The foreman then advised that he was instructed not to let Mr. Forbes report for work in that event, and he then took Mr. Forbes to the Personnel office. Mr. Mark was at the Personnel office, and indicated to Mr. Forbes that if he did not make repayment that day, he would be terminated. Mr. Forbes then produced a copy of a letter from the Ombudsman, requesting Hydro to defer taking any further action to collect the amount they said was owing by Mr. Forbes, until Mr. Forbes' complaint had been investigated. Mr. Mark conferred with head office, and it was agreed to permit Mr. Forbes to report to work without any further restraint. Hydro subsequently wrote to the Ombudsman indicating that Mr. Forbes was covered by a union agreement, and had a grievance procedure available to him, and the Ombudsman wrote to the parties indicating that he was suspending his own investigation pending Mr. Forbes' utilization of the grievance procedure. The union, however, was of the view that no argument could be made, on the basis of the collective agreement and the parties' practice, that Mr. Forbes was entitled to the room and board allowance once his family had moved up to Ripley, and accordingly had advised Mr. Forbes from the outset that any grievance would be premature until Hydro actually took some action to try to enforce repayment. No grievance was, therefore, filed, but on March 1st, Hydro received word from the Ombudsman that its investigation had been suspended. Hydro then lifted its own moratorium on enforcement procedures, and called Mr. Forbes into the Personnel office at the end of his shift on Friday, March 4th. Mr. Forbes was asked whether he was prepared to repay the amount that Hydro felt was owing, and Mr. Forbes indicated that he was not. Mr. Forbes was then advised that Hydro had no alternative but to terminate him. The steward who was present then pointed out that Mr. Forbes was entitled to two hours' notice under the collective agreement, and Mr. Forbes was accordingly permitted to work the following Monday. He was then terminated. In accordance with the company's policy with respect to employees who leave their employment while still owing the company money, Mr. Forbes' file was marked "Not For Rehire". (Hydro also pursues such employees through the civil courts and, where appropriate, the criminal courts.)

10. The union in this grievance challenges the employer's right to use an individual's employment as a lever to collect outstanding debts. It argues that the employer's recourse is to the courts. Alternatively, the union argues that an employer is not entitled to recover money paid under mistake of law, as it alleges has occurred here. The union initially at the hearing also took the position that the company's interpretation of the collective agreement respecting room and board allowance was wrong, but did not pursue that argument at the end. Had the union been of that view earlier, it is clear that the time to have grieved would have been in December of 1982 when Mr. Forbes was told his circumstances no longer warranted the room and board allowance, and he was cut back from that allowance to the lesser travel allowance. The chief steward, Steve Morrison, acknowledged in his testimony that he told Mr. Forbes that the union could not grieve for him until the company took some action to *collect* the money owing, because there was no doubt on the facts that the company was correct in concluding that Mr. Forbes was not entitled to the allowance. Mr. Forbes has now returned to employment in his home province, and testified that he has no wish to be reinstated with Hydro. Counsel advised the Board that Mr. Forbes' claim is for the full wages that he missed during his first six weeks of unemployment, together with the difference in earnings between Nova Scotia and Hydro beyond that. Mr. Forbes also wishes to have the "Not For Rehire" notation removed from his file. Counsel made some further reference to a claim for relocation costs and wasted rent in Ripley, but the theory of these damages was not developed, and, in

view of the lengthy period that Mr. Forbes did work before being terminated, is not obvious to the Board.

11. Counsel for Hydro argued that the law is clear that employers are entitled to recover monies which are acknowledged to have been paid in error, and that an employer need not confine itself to the often costly and lengthy method of collecting such overpayments through the Courts. He argues that an employer is entitled to use its *prima facie* right to discipline in such cases, on the basis that the employee is refusing without colour of right to turn over property which belongs to the company. He argues that this present case should be treated no differently than if the property being wrongfully withheld was, for example, a company car. Counsel for the trade union conceded that there appears generally to have been no change in the law since the days of *Heinz Limited*, 18 L.A.C. 362, and *Canadian Admiral Ltd.*, 19 L.A.C. 1, and those cases confirm the right of the employer to recover overpayments to employees. The only qualification counsel could point to was an *obiter* statement of Professor Rayner in *Air Canada*, 21 L.A.C. (2d) 101, to the effect that these older cases may not apply when the money has been paid out under mistake of law (as opposed to mistake of fact). Counsel for the union further conceded that an employer would have the right to use its powers of discipline to attempt to recover, for example, a company car improperly being withheld by an employee. The difference, he argues, is that with money, the employee likely will have already disposed of it in his everyday living, having been led to believe that the money is his, and that an element of detrimental reliance therefore precludes the employer from saying, in effect, "Pay up or be fired".

12. The Board agrees with counsel for the union that, where the employee himself has acted innocently, an element of detrimental reliance may separate the case of an overpayment from, for example, the simple case of a company car. On the other hand, the Board on the law submitted also would agree with the submission of counsel for Hydro that an employer is entitled to use its general powers of discipline as a means to attempt to recover property of the company, money included, at least where, as counsel himself qualified it, no steps are being taken on the employee's behalf to determine whether in fact an overpayment has been made.

13. In the present case, the union felt no basis existed for filing a grievance to challenge the company's interpretation of the room and board provisions of the collective agreement, and that was the appropriate method for doing so had a dispute existed (ref. *General Motors v. Brunet*, [1977] 2 S.C.R. 537). The Board finds, therefore, that Hydro was within its management rights to consider the use of discipline as a means to recover the amount of money it had overpaid Mr. Forbes on room and board allowance. All discipline is subject, however, to the test of "just cause" under the collective agreement, so that the question of basic fairness never ceases to be an element. What is "fair" will depend, as always, on the circumstances of each case, but an innocent employee is in general terms entitled to a reasonable period of time to discharge his liability to the company, following the discovery of the error. The principle of a "reasonable opportunity" would appear to at least take into account the size and length of the overpayment, and the extent to which the employee may, however innocently, have been responsible for the error.

14. The Board in the present case finds no responsibility whatever on the part of Mr. Forbes for the error which produced this overpayment. It was not unreasonable for Mr. Forbes to believe that room and board allowance continued, given the less than simple definition of

“residence”, the difference in tests between the collective-agreement treatment and the income-tax treatment, the retention of Mr. Forbes’ home in Nova Scotia, and Hydro’s own practice of maintaining the allowance when an employee’s family moves in with him on a “temporary” basis. And, of equal importance, Mr. Forbes is one employee who did exactly what Hydro requires in the event of a change in circumstance. He attended, on his own initiative, at the Personnel office and advised Ms. Smith that his wife and son had now moved in with him in Ripley. It is true that Mr. Forbes indicated his house in Nova Scotia as still being his permanent address. But it is also clearly true on the evidence that Mr. Forbes had only planned to be away from that address for as long as the job at Hydro lasted, and that it was D’Escousse, Nova Scotia, that he continued to call “home”. The Board therefore finds that Mr. Forbes’ reference to D’Escousse as his “permanent” address was not clearly inaccurate, and was done in complete good faith. He did disclose the fact that the house was presently locked up, and, as the entry on the Form confirms, that his telephone had been disconnected. Had Mr. Forbes been trying to deliberately leave the company with the impression that his family was up on a short-term visit only, he surely would not have asked at the same time that his OHIP coverage be changed to “family”. The company’s own records show that the change notice issued at Mr. Forbes’ request in September did not take effect until three months hence (December). This confirms to the Board that the same 3-month delay in OHIP coverage applies to Hydro as to the rest of the province’s residents, and Hydro’s Personnel office presumably would be aware of that.

15. We find that the Personnel office in fact, through Mr. Forbes, had ample indication of Mr. Forbes’ full change in circumstance. If Mr. Forbes, a rank-and-file employee, was under a mistaken impression as to what entitlement flowed from his new facts, Hydro had every opportunity, through Ms. Smith, to make whatever additional inquiries it felt were necessary, based on its own definition of “temporary”, and to set the matter straight. We find that Mr. Forbes neither withheld information from the company, nor misstated the facts of his current situation, other than his own mistaken conclusion that he continued to be entitled to room and board allowance, but on a taxable basis. Ms. Smith, on the other hand, clearly knew the distinction between “temporary” and “permanent” in the company’s own view, and had every opportunity to make the inquiries necessary to ascertain the facts precisely. Her failure to do so resulted in a pure mistake of fact and not, as counsel for the union contends, a mistake of law.

16. In summary, then, the respondent was entitled to claim its money back, and to ultimately enforce that claim, if it chose to do so, through its regular powers of discipline and discharge. But it had to give Mr. Forbes a reasonable opportunity to make up the loss. Having regard to the relative extent of the claim (being sizeable), the lengthy period of time over which Hydro had caused the liability to build up (from September 1981 to December 1982), and the total lack of blame which the Board has found can be attributed to Mr. Forbes for the error, we find that Hydro did *not* act reasonably in the opportunity it gave to Mr. Forbes to make redress. Even granted that Hydro did, as it points out, relax the deadline from time to time, so long as Mr. Forbes appeared to be making efforts to cooperate, and that the intervention of the Ombudsman resulted in a further voluntary postponement of the deadline, the Board finds it unreasonable for Hydro, on March 7, 1983, to have demanded immediate payment of the full 4,578 dollars owing. In the circumstances, Hydro was not entitled to treat Mr. Forbes as just another case of abuse, nor to allow its understandable concern over the mobility of its construction work force to take precedence. It may be that Hydro ought to have given more serious consideration to Mr. Forbes’ early inquiries about some form of repayment

plan by instalments, and that a mutually satisfactory time-payment plan could have been arrived at which did not run afoul of the *Employment Standards Act* (see *Employment Standards Act, 1974*, R.S.O. 1980, c.137, s.8, and s. 14 of the General Regulations thereunder).

17. In any event, for the reasons given, the Board finds that Hydro did not have just cause to terminate Mr. Forbes when it did on March 7, 1983. The grievance is therefore allowed. Mr. Forbes does not seek reinstatement, but is entitled to have the "Not For Rehire" designation removed from his file as soon as he has completed repayment of his debt to Hydro. Mr. Forbes is also entitled to the damages he claims for any loss in earnings from March 7, 1983, to the date of this decision, as a result of his wrongful termination. The calculation of damages payable, however, should properly take into account the debt owing from Mr. Forbes to the employer, which resulted in the present termination.

18. The Board shall remain seized should a dispute arise on the calculation of damages.

1278-82-U Joe Portiss, v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, Respondents

Damages – Duty of Fair Referral – Remedies – Unfair Labour Practice – Prior decision finding unlawful administration of hiring hall – Finding complainant discriminated against in job referrals – Damages calculated on basis of comparison of complainant's earnings with earnings of other active members – Amount reduced for failure to mitigate

BEFORE: Michel G. Picher, Vice-Chairman, and Board Members I. M. Stamp and W. F. Rutherford.

DECISION OF THE BOARD; September 30, 1983

1. By its decision dated July 11, 1983, (Reported at [1983] OLRB Rep. July 1160) the Board found that the respondent union violated section 69 of the *Labour Relations Act*. It ordered, among other things, that the complainant Joe Portiss be compensated for all wages and benefits lost "as a result of the violations found", and remained seized in the event of any dispute between the parties respecting the implementation of its order. The Board also ordered the appointment of an auditor qualified under the *Public Accountancy Act* to monitor and report, for a period of two years, to the general membership on the administration of the hiring hall rules and procedures, including job referrals. As the parties were unable to agree on the amount of compensation owing to Mr. Portiss the Board reconvened the hearing for two further days for the purpose of determining the compensation owing. The Board is also in receipt of the lists of auditors proposed by the respective parties, and is in a position to make a selection, the parties having failed to agree on that matter as well.

2. At the initial hearing the Board attempted to assist the parties by making several interim rulings on major points of dispute which stood in the way of an agreement on the calculation of compensation. Due to the acrimony which was present between the parties, and surfaced occasionally in the hearings, the Board met initially on a private, informal basis with

counsel for the parties in an attempt to determine compensation, still in the hope that guidance from the Board would assist the parties towards an agreed amount of compensation. Later in the day, when the positions of the parties were more clearly articulated the Board allowed Mr. D'Andrea, the union's business agent, and Mr. Portiss to attend with their counsel, but continued to maintain the privacy of the meeting in hopes of facilitating a mutually acceptable resolution of the issue of compensation. No objection was taken to that procedure.

3. At the end of the first day of hearing on compensation the Board made the following interim rulings:

1) That compensation could not be computed for Mr. Portiss by merely ordering the payment to him of the difference between his earnings and those of Onorio Cicchini, who was referred as a foreman to Rankin Construction on February 9, 1981 although he stood below Mr. Portiss on the out of work list (see para. 50 of the Board's decision of July 11, 1983). The evidence does not confirm that an adherence to the hiring hall rules in conformity with section 69 of the Act would have resulted in the referral of Mr. Portiss to the job in question. It appears that other members qualified as foremen who stood ahead of Mr. Portiss were also passed over in favour of Cicchini, and would have been entitled to that referral in preference to Mr. Portiss. Moreover, for reasons elaborated below, the following of any other member does not provide reliable means of estimating what Mr. Portiss' earnings might have been.

2) That allegations referred to in a letter of Mr. Iler dated November 18, 1982 and referred to in general terms in the Board's decision, were provable for the purposes of assessing compensation.

3) That compensation would not be ordered for the period from June 4, 1982 to the present because during that time, while he has been on full Workmen's Compensation benefits Mr. Portiss made himself unavailable for work referrals, without adequately explaining to the union that he was physically incapable of accepting referrals except for light duties, or without in fact taking any position with the union that it was under an obligation to direct such referrals to him.

In the result the issue for determination became the amount of compensation owing to Mr. Portiss for the period between November of 1980 and December 24, 1981, the time at which Mr. Portiss became unavailable for work due to his medical disability.

4. At the outset of the second day of the compensation hearing Mr. Portiss requested an adjournment of the hearing. He advised the Board that he had discharged his counsel following the initial hearing on compensation and that he needed time to retain and instruct a new lawyer. Counsel for the union did not consent to an adjournment and strenuously objected to any further delay of this matter, which has been ongoing over some fourteen days of hearing since the complaint was filed on October 8, 1982.

5. It is the general practice of the Board not to grant an adjournment unless it is agreed to by the parties, except in extraordinary circumstances. Extraordinary circumstances would

generally include unforeseen events beyond the control of a party, such as illness or difficulties in travel due to severe weather. The Board does not generally adjourn a hearing on the request of a party for time to seek legal counsel, particularly where that party had ample notice of the hearing and a reasonable time to retain and instruct counsel beforehand. In this case Mr. Portiss had, by his own admission, some nine days between his disagreement with his former counsel and the resumption of the compensation hearing. We do not see in these circumstances any reason to grant an adjournment merely because the complainant was not entirely satisfied with the Board's interim rulings. Among the items of dissatisfaction Mr. Portiss cited the failure of his counsel to adduce evidence to explain why Mr. Portiss voluntarily took a layoff from a job with Combustion Engineering. Given the Board's determination in paragraph 30 of its decision of July 11, 1983 that that event would weigh against Mr. Portiss in the assessment of compensation, we are satisfied that he was or should have been aware of that outcome over two months ago. In our view he had ample time to attempt to retain and instruct counsel, or to weigh and accept the alternative of completing the hearing with the lawyer he initially retained. The Board is also mindful of the prejudice which an indefinite adjournment could cause the respondent union, whose membership has obviously been divided by the ongoing controversy surrounding this complaint. Fairness to both parties and concern for the labour relations process require that this matter be disposed of without undue delay, in keeping with the Board's normal rules of procedure. For the foregoing reasons the Board ruled at the hearing that it would not depart from its normal procedures and that Mr. Portiss' request for an adjournment was denied.

6. We turn to the merits of the issue of compensation. Mr. Portiss submits that he should be compensated in an amount of more than \$40,000.00. The union argues that he should be paid nothing. Unfortunately that divergence eloquently reflects the flavour of this dispute from its beginning.

7. We consider the arguments of the parties in turn. Mr. Portiss submits that his compensation should be calculated by paying him at the rate of \$13.78 per hour for 72 working days lost between January 9 and April 14, 1981. That yields a sum of \$7,927.28 to which he adds interest calculated at 12%. He submits that the resulting amount are the earnings of which he was deprived in 1981. Subsequently Mr. Portiss was awarded a 10% permanent disability pension, the benefits of which may be paid to him for life, based on his earnings for 1981 as calculated under the *Workmen's Compensation Act*, R.S.O. 1980 c. 539, s. 43 as amended. He submits that his pension benefits are diminished because the base calculation was made on a diminished wage figure attributable to the respondent union's violations of its duty to fairly provide him job referrals through its hiring hall. On that basis he maintains that he should be awarded 10% of the earnings and interest he would have received multiplied by 43, representing a projected period of 43 years of disability, until he reaches the age of 75. With some admitted discrepancies in the calculation of interest, Mr. Portiss originally computed the amount owing following that approach to be \$47,046.53.

8. The union submitted a number of alternative means of assessing Mr. Portiss' claim for compensation. Its first alternative is to take the average of earnings for 1981 of five members classified as "burners", the classification of labourer for which Mr. Portiss was registered and for which the Board found he was wrongfully deprived of referrals. The five burners chosen are those who were wrongfully referred over Mr. Portiss. Mr. Portiss earned \$10,928.22 in 1981. It is common ground that there were no violations of the Act affecting him in 1980. The average earnings for the five burners in 1981 is \$14,539.22. The union

submits that Mr. Portiss should be paid the difference between that figure and his own actual earnings for the year, with deductions for unemployment insurance paid to Mr. Portiss as well as for a period of 19 days during which he was disabled and therefore unavailable for work. It also submits his award of compensation should be reduced by an amount of \$2,400.00 which it claims he would have earned but for having voluntarily quit a job at Combustion Engineering during the period in question. That calculation would leave Mr. Portiss with little or no compensation, as the deductions would virtually eliminate the difference between his actual earnings and the average calculated for the five burners.

9. Alternatively the union submits that the Board should follow the earnings of union member William Brain in 1981, a labourer who was referred out of turn ahead of Mr. Portiss in January and in whose shoes the union submits he would have been for the entire year but for the violations of the Act found by the Board. Brain's earnings totalled \$12,860.86. When the same deductions are applied to that figure Mr. Portiss, it is argued, is entitled to nothing.

10. As a third alternative the union submits that the comparison for Mr. Portiss be based on the wages for the year of Salvatore Gagliardi, the highest earner among the five burners who was referred work ahead of Mr. Portiss. Mr. Gagliardi earned \$17,064.25 in 1981. When the deductions listed above are applied to that figure, the union maintains that the difference between Mr. Gagliardi's earnings and Mr. Portiss' earnings is nothing.

11. A fourth alternative advanced by counsel for the union is based on a calculation of the estimated average earnings for the entire membership of Local 1089 for 1981. It is not disputed that the union's records show that in 1981, 1,185,187 hours were worked by the members of the local and that for the same period the average enrolment was 962 members. Assuming an hourly wage rate of \$14.31 per hour, which includes the hourly rate and vacation and statutory holiday pay, the average earning would be \$17,408.16. The union submits that that figure should be taken as a base for comparison with the actual earnings of Mr. Portiss, and it again submits that the deductions for unemployment insurance, the period of his disability, and his quitting Combustion Engineering would reduce the difference to no more than \$518.99, which it maintains is the maximum Mr. Portiss should be allowed to receive.

12. After careful consideration the Board does not accept any of the alternatives advanced by either Mr. Portiss or the union as the most reliable way of fairly assessing the amount of his compensation. Mr. Portiss' approach does not commend itself for a number of reasons. Firstly, it does not allow for the possibility that he may have earned more in 1981 because of the length or nature of the later referrals he did receive. Secondly, it is based on the assumption that he will live a certain number of years and will collect a pension for all of that time. As counsel for the union points out, the correct approach to that head of compensation would be to capitalize any projected loss to its present day value, by an actuarial calculation. Thirdly, and most significantly, it is not clear from the evidence before the Board that the Workers' Compensation Board did not assess his pension entitlement by reference to the average earnings of a person in his position, rather than by his actual earnings for 1981. It has the discretion to do so. Even if it did not, it would appear open to that tribunal to adjust Mr. Portiss' pension in light of any finding by this Board that his earnings for 1981 were diminished by the union's breaches of the *Labour Relations Act*. In our view, consideration of that question is best left to the Workers' Compensation Board.

13. The Board has equal concern with the alternative approaches advanced by the union.

To compare Mr. Portiss to other members on a selective basis leaves much uncertainty. Determining the amount that an employee would have earned, but for the wrongful application of fair hiring hall rules, is a speculative exercise. If a list of members is taken into account, it becomes virtually impossible to trace with any certainty the figure, the of employment for the entire year of any particular member referred ahead of him. Nor can there be any precise determination of whether he was in fact better off because a later referral might, for example, have brought him a longer assignment of a job with more overtime. When variables such as job shutdowns because of weather or loss of time due to accidents, illness, an employee's decision to quit and the time elapsed before he re-enters the hiring hall list are taken into account, it becomes virtually impossible to trace with any certainty the road not taken. In these circumstances we see little reliability in any formula for compensation that attempts to put the complainant in the shoes of any selected individual or group of members.

14. The Board recognizes that no formula is absolutely certain. It is satisfied, however, that the justice of the case is more likely to be assured by broadly determining the average earnings of the general membership of the local, and comparing them to the earnings of the complainant, with some allowance for his personal circumstances and his conduct, particularly as the latter reflects any failure to mitigate his losses. The substance of the section 69 complaint is that Mr. Portiss was discriminated against; the thrust of the remedy should therefore be to place him, as far as possible, in a position comparable to that of the general membership.

15. It is instructive that the average earnings, for 1981 for the membership of the local are estimated at \$17,408.16. That is obviously a low real estimate, given that considerably less than the 962 members enrolled actually worked as labourers for the entire year. The union conceded that the figure of 962 covered all dues paying members and would have included those members who maintained their membership even though they may have been inactive due to disability, employment in other industries, absence from Sarnia or for other reasons. In the Board's experience it would not be excessive to assume an inactive membership of as much as 10% of the dues paying members of the local. Taking that into account, it appears to the Board that a fair base of comparison is between Mr. Portiss and the active members, with allowance for Mr. Portiss' circumstances as elaborated below.

16. Based on the unchallenged figures provided by the union and allowing for unemployment, it would not be unfair to assume for the purposes of calculating compensation that the average active member of Local 1089 worked some 34.2 weeks of 40 hours during 1981. That is the number arrived at by dividing the total of hours worked in the year by an active membership of 866 labourers. That is obviously a rough figure; no doubt some worked less and others worked more, with varying rates of job premiums and amounts of overtime going to different individuals. But for the purposes of our calculation it would seem to reflect a reasonably realistic average. The wage rate, excluding benefits, for the ICI sector in effect during the greater part of 1981 was \$13.38 per hour, which is comprised of hourly wages, vacation pay and statutory holiday pay. Applying that rate to 34.2 weeks of work at 40 hours per week yields an average earnings figure of \$18,303.84. That is the figure which the Board determines to be a reasonably reliable bench mark to compare the lot of Mr. Portiss to that of the average of the active members of Local 1089 in that year. Given that the rate under the ICI agreement is the highest base wage available to labourers, selecting that rate tends to give Mr. Portiss the benefit of the doubt.

17. If the average member earned \$18,303.84 in 1981, Mr. Portiss earned \$10,928.22. The difference is \$7,375.62. The Board does not accept the union's contention that Mr. Portiss' unemployment insurance benefits should be deducted from the difference for the purposes of calculating his compensation. Firstly, there is no evidence from which the Board can determine what proportion of the \$2,547.00 Mr. Portiss received in U.I.C. benefits was attributable to periods for which he would have been at work but for the respondent's violations of the Act and what part of it would have been paid to him in any event through the normal incidence of unemployment. More importantly, to the extent that the Board's order of compensation is in the nature of damages for the violation of the complainant's right under the Act to a fair access to employment through his hiring hall, and not for remuneration not paid to him, judicial authority would not support the abatement of his claim by the amount of unemployment insurance benefits received (see, *Peck v. Levesque Plywood Ltd.* (1979), 80 CLLC ¶14,005 (Ont. C.A.)).

18. We are satisfied, however, that the amount of \$7,375.62 must be reduced in two ways. Firstly, there must be a reduction by virtue of Mr. Portiss voluntary quitting of his job at Combustion Engineering, a quit for which, as the Board has noted, no explanation was given in evidence. We do not, however, accept the union's submission that Mr. Portiss would necessarily have worked on that job for a further three weeks with substantial amounts of overtime at a net rate of \$800.00 per week. In our view that is an inflated figure unsubstantiated beyond the gratuitous speculation of one witness. In all of the circumstances the Board finds that Mr. Portiss failed to mitigate his losses by quitting his job at Combustion Engineering, and that his claim should therefore be reduced by the amount of \$1,000.00.

19. It is also clear that Mr. Portiss was medically disabled and was therefore unavailable for work for a period of 19 days in May of 1981. The Board accepts the submission of the union that it should not be liable for any deprivation of earnings for that period. Put differently, Mr. Portiss would, assuming no violation of the Act, still have fallen 19 days short of the average total earning days for the local. The difference between his earnings and those of the average must therefore be reduced by 19 eight hour days at a wage rate of \$13.38 per hour, or a total sum of \$2,033.76.

20. The Board does not see any other basis to reduce the claim of Mr. Portiss. While he may have refused jobs in October of 1981 for the period of a few days, the evidence discloses that the practice of jockeying to avoid unfavourable referrals was not uncommon among the membership, and that a substantial number of employees did it without being penalized on the hiring hall list. While the Board does not approve that conduct, it cannot, in the circumstances, conclude that it should be held against Mr. Portiss in the computation of his compensation.

21. For the foregoing reasons the Board orders that the respondent Local 1089 pay forthwith to Mr. Portiss the sum of four thousand three hundred and forty-one dollars and eighty-six cents (\$4,341.86), with interest calculated from May 1, 1981, pursuant to the Board's Practice Note 13, as compensation pursuant to the Board's order herein dated July 11, 1983. The respondent shall also make forthwith on behalf of Mr. Portiss all payments to the welfare, dental and pension funds referred to on page 204 of the ICI collective agreement which would have been directed to those funds for his benefit, in amounts corresponding to further earnings of \$4,341.86.

22. The Board further directs the respondent to retain the accounting firm of Lorne Coleman, of Chatham, Ontario, for a period of two years for the purposes of auditing the procedures and records of the respondent's hiring hall pursuant to the Board's order of July 11, 1983.

0756-82-R United Food and Commercial Workers International Union, Applicant, v. **Primo Importing and Distributing Co. Ltd.** Respondent, v. Primo Employees' Association, Intervener.

Certification Where Act Contravened – Practice and Procedure – Remedies – Prior decision finding employer unlawful conduct and directing vote with remedial measures – Union losing vote – Alleging unlawful conduct by employer and seeking automatic certification under s.8 – Expressly indicating no desire to have further remedies on new vote directed – Board finding no prima facie case for s. 8 – Dismissing application and imposing bar in view of position taken by union

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and S. Cooke

***APPEARANCES:** James Hayes, Vincent Gentile, Ron Lebi and Stan Henderson for the applicant; R. M. Parry, Arthur Pelliccione and Angelo Capozzi for the respondent; M. G. Horan and M. Zangolli for the intervener.*

DECISION OF THE BOARD; September 13, 1983

1. In a majority decision (with Board Member J. A. Ronson dissenting) dated June 28, 1983 in this application for certification, the Board directed that a representation vote be taken of the employees of the respondent in the voting constituency described in paragraph 26 of that decision. In that majority decision, the Board also declared that the respondent had contravened section 64 of the Act and granted various remedies under section 89 of the Act, to rectify the adverse impact of the respondent's contraventions of the Act.

2. On the taking of the aforementioned representation vote directed by the Board, not more than fifty per cent of the ballots cast were cast in favour of the applicant.

3. By letters dated July 20, July 28, and September 1, 1983, counsel for the applicant filed with the Board a number of allegations of improper or irregular conduct by the respondent and by Marcello Zangolli, the President of the intervener. At the September 8, 1983 hearing scheduled by the Board for the purpose of hearing the evidence and representations of the parties with respect to those allegations, counsel for the applicant indicated that the only remedy requested by his client was certification without a vote under section 8 of the Act. After considering the initial submissions of the parties, the Board called upon the applicant to show cause why the application ought not to be dismissed on the ground that the application, including the allegations contained in Mr. Hayes' letters of July 20, July 28 and September 1, 1983, did not make out a *prima facie* case for the remedy requested. After hearing

and considering the applicant's submissions concerning that matter, the Board gave the following oral ruling, which is hereby confirmed:

In the circumstances of this case, we find it to be unnecessary to call upon Mr. Parry and Mr. Horan since we are unanimously of the view that the application, including the allegations contained in Mr. Hayes' letters of July 20, July 28, and September 1, 1983, does not make out a *prima facie* case for certification without a vote under section 8 of the Act, which is the sole remedy requested by the applicant. If those allegations were duly proven, the most which they would prompt the Board to do in the circumstances is to order that another representation vote be conducted after further meetings had been held, perhaps in conjunction with other remedies of the type contained in our decision of June 28, 1983 in this matter. We would not be prepared in the circumstances of this case to exercise our discretion under section 8 of the Act to certify the applicant without a representation vote as we are not satisfied that the situation has changed materially from the situation described in that decision. Since the applicant has expressly indicated that it is not requesting that further meetings be directed or that a further representation vote be held, this application will be dismissed with the usual six month bar.

4. The application is therefore dismissed.
 5. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the voting constituency within the period of six months from the date hereof.
 6. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of thirty days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such thirty day period.
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1078-83-R Canadian Union of Operating Engineers & General Workers, Applicant, v. **Riverside Hospital of Ottawa**, Respondent, v. Employee, Objector

Membership Evidence – Practice and Procedure – August 31 fixed as terminal date in certification application – Board receiving membership evidence stamped September 1 by registered mail – Date on stamp governing documents sent by registered mail – Union failing to satisfy Board of error by Post Office – Membership evidence not considered timely

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: Russell W. Zinn, Melville H. Dell and Cornell Kirko for the applicant; Johanne Larouche and Michael S. Ruddy for the respondent; no one for the objector.

DECISION OF THE BOARD; September 30, 1983

1. This is an application for certification.

[Paragraphs 2-4 omitted]

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5. A final issue concerns the apparent late filing by the applicant of seven membership documents upon which it seeks to rely. The documents were sent by registered mail. Section 73(1) of the Board's Rules provides:

73.-(1) Evidence of membership in a trade union ... shall not be accepted by the Board ... unless the evidence

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(b) is filed not later than the terminal date for the application.

And section 75(1) provides:

75.-(1) Where a document is required to be filed by these Rules, filing shall be deemed to be made,

(a) at the time it is received by the Board; or

(b) where it is mailed by registered mail addressed to the Board at its office at 400 University Avenue, Toronto, Ontario, M7A 1V4, at the time it is mailed.

The "terminal" date for this application was fixed as August 31, 1983, but the registration stamp on the applicant's envelope bore the date September 1st, 1983.

6. Normally the Board will accept the date on a registration stamp as an accurate in-

dication of the date on which a document has been mailed, and this mechanism obviously is one of great convenience for parties who deal (and especially those who deal regularly) with the Board. On the other hand, when the same indicator, being the registration stamp, suggests to the Board that a document was mailed late, there clearly must be some onus on the party proffering the document to satisfy the Board that the error is that of the Post Office.

7. Here the applicant was advised prior to the initial hearing date of September 9th that the registration stamp for seven of its cards indicated that they had been submitted beyond the terminal date. The applicant advised the Board that the documents had in fact been mailed on the terminal date, but did not bring to the hearing in Toronto the individual who had registered the documents at the Post Office. The Board saw fit to re-schedule the matter for hearing in Ottawa one week later, for the sole purpose of permitting the applicant full opportunity to adduce its evidence in support of its assertion that an error had been committed by the Post Office.

8. At that hearing the applicant called Mr. Kirko, its Secretary-Treasurer, who testified that he was certain that he registered the material at a Shopping Mall Post Office some time after 3 p.m. on August 31st. He testified that he could not have done so on the subsequent days because he was scheduled to work those days. No work schedule was produced before the Board to confirm Mr. Kirko's recollection. Neither was the applicant's copy of the registration slip produced, because, the applicant explained, it had meant to pick it up on the way to the hearing, but ran short of time. The applicant did, however, produce a photostat from its own registration book, showing a stamp of "September 1st", and did not dispute that the stamp on the registration slip was the same. Mr. Kirko testified that he asked an employee at the Mall Post Office whether they had a practice of turning their registration stamp forward at some point in the day, and he was advised that they did not. Mr. Kirko says the employees, who worked for the Mall, were not very co-operative, and he did not ask them to check their daily ledger to see on what date his registration had been entered. Neither did the applicant make any other inquiries.

9. The Board on the evidence finds that the applicant has failed to satisfy it that an error has been made by the Post Office in this case, and that Mr. Kirko's recollection of the dates is the accurate one. If the applicant wishes to proceed with the present application, therefore, it must do so without the 7 late cards.

10. The matter is referred to the officer.

0927-83-R Service Employees' Union, Local 183, Applicant, v. **Riverview Manor**, operated by Daynes Health Care Ltd., Respondent

Sale of a Business – Nursing home not meeting Ministry safety standards closed down – Licence purchased by company operating other homes in area – Purchaser building new home on land nearby purchased from vendor and absorbing majority of vendor's residents – Different management and operating procedure overridden by purchase of key asset of licence and take over of residents – Sale found

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members J. D. Bell and C. A. Ballentine.

APPEARANCES: Naomi Duguid, Donald Burshaw II and Carolyn Shaughnessy for the applicant; K. W. Kort, E. Daynes and P. Powers for the respondent.

DECISION OF RICHARD M. BROWN, VICE-CHAIRMAN AND BOARD MEMBER C. A. BALLENTINE; September 15, 1983

1. This is an application under section 63 of the *Labour Relations Act*. Local 183 of the Service Employees' Union (hereafter "Local 183") contends Riverview Manor, operated by Daynes Health Care Ltd., (hereafter "Riverview") is a successor employer to Balmoral Lodge Nursing Home Ltd. (hereafter "Balmoral"), by virtue of the transfer of a licence, patients, and a parcel of land from one employer to the other.

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I

3. Until recently, Balmoral operated a nursing home, Balmoral Lodge, at 293 London Street in Peterborough. Carol Ross is the president of Balmoral which she owns jointly with her husband. Her parents first opened the Balmoral home in 1958, and it closed on August 18, 1983. At that time, Balmoral was licensed to have fifty-one beds. The Ministry of Health had informed Mrs. Ross that the structure on London Street did not meet provincial fire safety standards, and Balmoral hoped to erect a new building on property it already owned at 1155 Water Street in Peterborough, but was unable to obtain financing. At this juncture Balmoral decided to sell its licence.

4. Riverview is operated by Daynes Health Care Ltd., one of several companies of which Earl Daynes is the president and major shareholder. These companies operate seven nursing homes containing a total of 780 beds. Before Riverview commenced operation, there were two Daynes homes in the Peterborough area; Springdale Nursing Home (hereafter "Springdale") located five miles outside the city, and Frost Manor (hereafter "Frost") in Lindsay. Local 183 represents employees at two of Mr. Daynes' homes.

5. Balmoral and Mr. Daynes entered into an arrangement whereby Daynes would purchase both Balmoral's licence and the property at 1155 Water Street. Daynes intended to apply the licence to a new home to be constructed on Water Street. An agreement between Balmoral and Earl Daynes was executed on April 16, 1982. Daynes agreed to "purchase the licenced

nursing home business and undertaking” of the vendor. The agreement defined “licenced nursing home business” to mean “the 51 bed nursing home presently located ... at 293 London Street, Peterborough”. “Undertaking” was defined as “the right to operate the 51 bed licenced nursing home business, granted in the form of a licence issued under the authority of the Ministry of Health”. The contract was conditional on the Ministry of Health approving the transfer. The closing date was the earlier of June 30, 1983 or within 30 days of written notification by the purchaser that it had received approval of the transfer from the Ministry of Health. Mrs. Ross was confident the Ministry would give its permission. A schedule to the April 16, 1982 contract provided for the transfer of the land on Water Street from Balmoral to Mr. Daynes. The vendor took back a second mortgage, a second chattel mortgage, a second assignment of income, and a second assignment of nursing beds, by way of security. Interest on the second mortgage was to run from the time patients residing at Balmoral Lodge move to the new facility. By an agreement dated April 20, 1983, Daynes and Balmoral agreed that the contract entered into a year before covered only the licence and not any assets, except the land. The amount Daynes paid Balmoral was not disclosed, but Mr. Daynes testified the licence accounted for eighteen per cent of the total cost of Riverview Manor, including land, construction and equipment. This figure was calculated by dividing the cost of the licence, on one hand, and the remaining expenditures, on the other, by fifty-one. However, the other expenditures will be spread over sixty-five beds, the home’s current capacity. If these expenditures were divided by sixty-five, the percentage figure would be higher.

6. The Ministry of Health was advised Balmoral proposed to sell its fifty-one bed licence to Mr. Daynes for a new home to be constructed by him on Water Street, as this transfer could not be completed without the Ministry’s authorization. Daynes submitted what he called a management package to the Ministry, detailing such matters as his experience in the industry, the activities planned for residents, the design of the home, and financial data. Subsequently, Earl Daynes and the management team who would operate the proposed Riverview Manor attended an interview conducted by a panel of officials from the Ministry of Health. Daynes was accompanied by his operations manager, administrator/director of nursing, food supervisor, activity director and accountant. In the fall of 1982, the Ministry authorized the transfer of the licence from Balmoral to Daynes. The construction of Riverview Manor began in October 1982, and it was completed on August 10, 1983. On the next day a team of inspectors from the Ministry of Health visited Riverview Manor and gave final approval for it to open as a home licensed for fifty-one residents.

7. While construction was in progress the Ministry insisted that the top floor of Balmoral be closed. The eighteen residents who had lived there were transferred to Extendicare’s home in Peterborough in February, 1983. Balmoral’s legal capacity was temporarily reduced from fifty-one to thirty-three, and Extendicare’s licensed capacity was increased correspondingly on a temporary basis, to drop back to its original level through attrition.

8. The remaining thirty-three residents of Balmoral Lodge were transferred to Riverview Manor between August 15 and 18, 1983. During this brief period the two homes operated concurrently with the approval of the Ministry of Health, and when the last residents were moved Balmoral surrendered its licence. Balmoral is now engaged in discussions with Trent University about the sale of the premises on London Street.

9. At present Riverview Manor has forty-two residents of whom thirty-eight previously resided at Balmoral Lodge. Thirty-three moved directly from there to Riverview Manor, and

five stopped off at Extendicare for several months. Of the eighteen people who went to Extendicare, one returned to Balmoral Lodge before August 1983, and five died, so that only seven remain at Extendicare. Four Riverview residents transferred there from Sprindale and Frost. Former residents of Balmoral Lodge were under no obligation to move to Riverview Manor. Although demand for beds exceeds supply in the area, according to Mrs. Ross, they could go to Sprindale Nursing Home to fill vacancies there created by people who want to move to Riverview Manor. Those who stopped off at Extendicare were free to stay there.

10. Balmoral employees were terminated on August 18, 1983. Carolyn Shaughnessy had worked at Balmoral Lodge for four years, first as a health care aid and later also as activity director, and is also chief steward for Local 183. She gave evidence concerning the fate of her fellow workers. To her knowledge, all Balmoral employees were interviewed by Riverview. Three members of the bargaining unit were hired by Riverview as aids, and four or five of the seven nurses at Balmoral Lodge, who fell outside Local 183's bargaining unit, also went to Riverview Manor. One person engaged as an aide by Riverview had worked in the laundry and kitchen at Balmoral Lodge, and she, according to Shaughnessy, left Riverview Manor because she experienced difficulty doing her new job after a four-day crash course. A seniority list for the Balmoral work force contains the names of eighteen full-time employees and thirteen part-time employees. Mrs. Shaughnessy testified approximately six of the full-time employees have found work elsewhere, but they are only working part-time. Mrs. Ross described these jobs as permanent.

11. The management team at Riverview was drawn from other nursing homes in the Daynes system. Mrs. Patricia Powers is the operations manager for all nursing homes in the Daynes organization. Denise Howran, the administrator/director of nursing, worked before as a nurse at Springdale. Margaret Boyd is the food supervisor, a job she previously performed at Springdale, and Frost. The activity director is Lyn Patridge who filled the same role at Springdale, upon her promotion from the position of nurse's aide. Joan Hiasman, the laundry/housekeeping supervisor, also held this job at Springdale. Eight nurses aides were brought to Riverview from Springdale and Frost. According to Mrs. Powers these employees were selected on the basis of the quality of their work, to ensure the same level prevailed at Riverview, both on their part and on the part of others they taught. Mr. Daynes testified his policy was to promote from within to give employees an incentive. When Frost Manor opened a few years ago a similar transfer of employees from Springdale occurred. The remaining positions at Riverview were filled from a pool of 300 applicants, and all of those hired were interviewed by Powers, Howran and Boyd. Employees began an initiation program at Riverview Manor on August 9, 1983.

12. Patricia Powers described the policies and procedures followed at Daynes' nursing homes. The same basic policies and procedures are implemented at each home, although the operations manual is adapted for each in some respects. The manual fills a thick three-ring binder, and the table of contents, which was introduced into evidence, breaks down into the following sections:

I. Organization and Management

II. Personnel Policies

III. Educational Programs

IV. Job Descriptions and Work Schedules

V. Admission Discharge, Transfer and Leave of Absence

VI. Services Provided

VII. Safety and Emergencies.

The policies and procedures set out in the manual are now in force at Riverview, and were the source of the management package submitted to the Ministry in conjunction with the licence transfer from Balmoral. Riverview has not drawn upon the practices followed at Balmoral.

13. Earl Daynes plans to expand Riverview Manor in the future. It is presently licensed for fifty-one beds, but is built to accommodate sixty-four. An additional ten to twenty beds could be added by building new bedrooms, without expanding any other facilities. Mr. Daynes hopes to eventually increase the capacity of the home to between one hundred and one hundred and thirty-five residents. He has already entered into a conditional agreement to purchase another licence for thirty-three beds, subject to the Ministry of Health's approval, but no management package has yet been submitted to the Ministry to support a request for a licence transfer. In addition, Daynes has bid, along with seven other operators, on a Ministry tender for an additional twenty-five new beds in the Peterborough area. This application has passed the interview stage, and Mr. Daynes expects an announcement of the Ministry's decision later this week.

14. The basic rate charged by nursing home operators is fixed by the Ministry of Health. The Ministry pays two-thirds of the rate for each resident and the resident pays the other third. The Ministry also fixes rates for preferred services (e.g. single rooms), but does not contribute toward them.

II

15. The parties disagree about the proper application of section 63(1) and (2) to the facts at hand:

63.-(1) In this section,

(a) "business" includes a part or parts thereof;

(b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is,

until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

The parties are agreed that Riverview now stands in the shoes Daynes wore when he entered into the agreement with Balmoral. Counsel for Local 183 contends that a sale of a business is established by the simple fact that a fifty-one bed home on London Street closed during the same month that a home of the same size opened on Water Street. Focusing upon the transfer of the licence, she argued Riverview drew its life from Balmoral. The sale of the land was said to tip the balance even further in the union's favour. Although goodwill was not sold, she said, Riverview attracted Balmoral's former residents because it went out of business. We were urged to find the role played by the Ministry of Health as intermediary was irrelevant. Counsel for Riverview emphasized what was new at Riverview Manor; the management team, the policies and procedures, the building, and all equipment. He noted that the land deal was not contingent on the Ministry's approval of the licence transfer. Counsel also suggested Riverview ought to be viewed as an integral part of the larger Daynes organization.

III

16. Amorphous words like sale and business derive a more precise meaning from the purpose they were chosen to serve, and take on a very different hue in the world of labour relations than in a commercial law setting. Section 63 is calculated to balance several competing concerns. First, the employees of the predecessor have a claim both to continued employment, under the terms and conditions set out in their collective agreement, and to be represented by their chosen bargaining agent. When they are terminated by the predecessor, they look to the successor for these benefits. However, in some cases, their employment relationship is strongest when the successor so radically alters the nature of the business that it shifts from one labour market to another.

17. Next there is the entrepreneurial freedom of the predecessor employer. The marketability of a business is impaired, at least to some degree, by requiring a purchaser to abide by bargaining rights and any collective agreement to which a vendor is bound. Conversely, successor employers would prefer to acquire businesses free of the encumbrances associated with collective bargaining. This interest, shared by both parties to the transaction, is strongest when the successor so radically alters the nature of the business that it shifts from one labour market to another. In this context, neither the vendor's employees nor its collective agreement, may be suited to the new enterprise.

18. Another interest group is introduced when a successor employer already has a work force at the time of the transaction with the predecessor. The business may not provide enough jobs for all of those who previously worked for the two employers. Both work forces assert a claim to continued employment in these circumstances. Job security is not the only interest of the purchaser's employees: they also deserve a say in the choice of their bargaining agent. In some cases, both the predecessor and successor continue to employ the same people as they had at the outset, and the successor's employees do not wish to acquire the union that represents the other work force.

19. These considerations have been taken into account by the Board in its interpretation and application of section 63. In the textbook example, the ownership of a business changes hands, but the same employees carry on doing the same work, under the same management.

team, for the same customers. The successor has no employees before transaction. There can be no doubt this transaction is caught by section 63. If this is not a sale of a business, nothing would be! See, for example, *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691. The successor employer is obliged to recognize the trade union as bargaining agent for the transferred employees, and also to respect the collective agreement in dealings with them.

20. Examining the conflicting interests in the paradigm case of a sale of business helps one to understand why this label is not applied to transactions that involve a dramatically different constellation of concerns. In the text book example, the predecessor no longer requires the services of its employees. Section 63 insulates them against unemployment attributable solely to the sale and, at least for the life of a contract, against any deterioration in their terms and conditions of employment. This protection is achieved by curtailing the commercial liberty of the two employers to arrange their affairs by reference only to self-interest. However, since the work performed has not changed, the predecessor's work force and collective agreement are not inappropriate for the successor's enterprise. There are no other employees to be affected by the application of section 63. This is the balance of interests struck when the Board finds there has been a sale of a business within the meaning of section 63. The successor employer in the preceding example voluntarily engaged its predecessor's work force, but the competing interests, and the legal result, are no different if all new employees are hired.

IV

21. But not every transaction between two employers constitutes a sale of a business. A substantial shift in the configuration of competing interests has often led the Board to the contrary conclusion. The interests of the successor employer come to the forefront when the sale brings about a change in the nature of the work performed. In this context the Board may issue a declaration under section 63(5):

The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection (2) becomes bound by the collective agreement, or within sixty days after the trade union or council of trade unions had given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

22. From a functional point of view, the termination of bargaining rights under section 63(5) assigns less weight to the concerns of the predecessor's employees than to the competing interest of the successor in carrying on a new work process unencumbered by collective bargaining obligations tailored for a different setting.

23. The Board has also recognized that persons already in the employ of the successor at the time of the transaction in question have a claim to continued employment. In *Dominion Stores Limited*, [1979] OLRB Rep. July 626, both employers operated a retail grocery business. The successor moved out of one store into leased premises previously rented by the predecessor. The lease and one-half million dollars worth of equipment were acquired through

an intermediary. The employees who worked for the successor at its original location continued to do so at the new store, and the Board relied heavily upon the fact that the successor retained existing employees, rather than hiring any new ones:

9. Dominion Stores, a retail food chain with no corporate connections to Gordons, closed a Dominion Store outlet at 3830 Dougall Road on a Saturday and opened a Dominion Store outlet at 3220 Dougall Road the following Monday. *The employees from 3830 Dougall were transferred to 3220 Dougall Road.* In the circumstances of this case the Board views the move by Dominion Stores to premises previously occupied by Gordons, including the so-called restrictive covenant, and the purchase of certain of the fixtures used by Gordons as undertakings in conjunction with the transfer of an existing business and not undertakings in conjunction with the purchase of the predecessor's business. The business which presently exists at 3220 Dougall Road is not the "continuum" of the predecessor's and accordingly, the Board hereby declares that there has not been a sale of a business within the meaning of the Act.

(emphasis added)

The conclusion that there had not been a sale of a business rested partially upon a five-month hiatus, between the predecessor's exit from the store and the successor's move into it, that stopped the running of good will between the two employers. An analogous situation led to the same outcome in two other cases: *Grand Valley Ready Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663, at para 23; and *Norjohn Contracting Limited*, [1978] OLRB Rep. May 78, at para. 13.

24. The result reached in these cases preserved the existing employment relationships of the successor's employees, rather than visiting an unwanted trade union on them or permitting them to be displaced by the predecessor's employees. This choice favours not only the successor's work force, but also the two employers whose commercial liberty is not curtailed. These interests together outweigh the claim of the predecessor's employees to employment and union representation. A commercial lawyer might think the successor's employees have no bearing on whether or not a transaction is properly labelled as a sale of a business. But a labour lawyer who ignored this aspect of a case would be turning a blind eye to one of the interests section 63 is designed to protect.

25. The number of people employed by the successor did not increase as a result of the alleged sale in *Dominion Stores, supra*. In the converse situation, the predecessor employer's work force is not reduced. In *Canada Cement Lafarge Ltd.*, [1975] OLRB Rep. Dec. 905, the predecessor was forced by a pollution problem to dismantle its cement manufacturing facility, and to move it and all employees to another location. The original site was sold to the successor who quarried the limestone located there, but did not produce cement. The determination that there was not a sale of a business was grounded on the different uses to which the property was put, and also upon the predecessor's retention of all of its employees:

Here, neither the bargaining agent nor the employees within the C.C.L. bargaining unit have been affected by the alleged sale. The reason for this is that, on a proper construction of the facts, the business was not sold but was moved to a new location with bargaining rights voluntarily

extended to the applicants and individual employment opportunities given to persons formerly employed at the Point Anne site. To go further, as the applicants suggest, and hold their bargaining rights attach to any business which may be commenced at the former site would be to give a meaning to section 55 [now 63] which, in our view, was not intended by the Legislature. Having regard, therefore, to the mischief rule of statutory interpretation (see *Heydon's Case*, 76 E.R. 637, cited in *Trenton Riverside Dairy Products* case, *supra*), we are fortified in our view that the relief which the applicants request must be denied. (para. 16).

(emphasis added)

In both *Grand Valley Ready Mixed* and *Norjohn Contracting*, *supra*, the predecessor retained all of the employees who had worked for it before the transaction in question. This factor, along with other considerations, led the Board to conclude there had not been a sale of a business.

26. In contrast to these cases, a sale of a business was found in *More Groceries Limited*, [1980] OLRB Rep. Apr. 486. Once again both employers carried on a retail grocery business. The predecessor moved out of a supermarket and transferred the lease and \$14,000 worth of equipment to the successor. Two weeks earlier, the predecessor had opened another store five miles away, and all of the employees who had worked at the vacated premises were moved to this and other stores pursuant to a guarantee of employment circumstances would be to allow a union to expand its bargaining rights by sweeping in the successor's employees was not adverted to in the majority's reasons for decision, but was stressed in the dissenting opinion.

27. The predecessor's employees stand to lose very little as a result of a commercial transaction if they remain with their former employer and are not deprived of the benefits of collective bargaining. A strong argument can be made that their interests ought to give way to entrepreneurial freedom. Moreover, to find a sale in these circumstances would be to allow a union to expand its bargaining rights by sweeping in the successor's employees who it had not organized. In *Canada Cement Lafarge*, *supra*, the Board construed section 63 with an eye to its purpose, and ruled a business had not been sold, even though a commercial lawyer might have disagreed.

V

28. In many cases, there is no substantial change in the nature of the work performed, the predecessor ceases to employ some people, and the successor's work force expands. The successor either engages the employees released by the predecessor or hires additional employees from some other source. There is obviously a sale of a business if most of the assets of the enterprise, the vast majority of customers, and management expertise pass from one employer to the other. This is once again the text book example. But often something less changes hands. The predecessor may transfer assets and goodwill to the successor, but not "known how". Alternatively, only assets and "know how" may be transferred. In the extreme case, none of these three elements is conveyed; for example, the predecessor merely subcontracts janitorial work to the successor. These types of cases pose the greatest difficulty for labour relations boards. The competing interests are readily identified, but not easily reconciled. On the one hand, the predecessor's employees lose the benefits of collective bar-

gaining, including perhaps their jobs, in the event the transaction is not characterized as a sale of a business. On the other, to apply this label is to restrict the economic initiative of both employers. The same conflicting concerns are present when assets, customers and expertise move between employers as when one or more of those factors is not transferred. However, as the law casts its net wider and wider, more employers will be caught more often. The legislature draw the line at the sale of a business, choosing a statutory threshold that lacks precision, because it is phrased in general language.

29. This Board has consistently distinguished a business from its assets. The point was eloquently put in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193:

30. A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a "going concern", something which is "carried on." A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets.

This proposition is best illustrated by two cases involving transactions between employers in the retail grocery trade. In this industry, the most important assets are premises and merchandising equipment: the only other assets a merchant has is inventory, and it is rarely sold to another retailer. In *Sunnybrook Food Market*, [1966] OLRB Rep. Oct. 531, bargaining rights did not attach to the successor who received equipment and an assignment of a lease from the predecessor. The reason for this conclusion was the successor did not also acquire the customers of the predecessor, because it opened another store near by:

8. In both the *Dutch Boy* case and the instant case, much was made of the absence of a sale of goodwill and the absence of a restrictive covenant. The Board in the *Dutch Boy* case concluded, and we would with respect agree, that the absence of these items did not of necessity require the conclusion that there had not been a sale of a business. See also the *L & M Food Market* case, O.L.R.B. Monthly Report, September 1965, p. 440. The determination of the question whether there has been a sale of a business within the meaning of section 47A [now 63] can only be made on the basis of a consideration of all the circumstances of any case. Clearly, as the Board indicated in the *Dutch Boy* decision, the value of "goodwill" must be assessed having regard to the nature of the enterprise. We would only add that that assessment must be made in the context of the entire circumstances surrounding the transaction. In the *Dutch Boy* case, since, as the Board found, the predecessor employer, disposed of its entire operation in the area, the inclusion or exclusion of the item "goodwill" made no tangible difference, and the transactions which took place constituted a sale of the business, notwithstanding the absence of any reference to goodwill. In the instant case, however, the absence of any transfer of goodwill does have significance, since the vendor has remained in business in the same market area, as a competitor or Sunnybrook, and, indeed, invoked the "goodwill" of its customers at the time of its relocation.

9. Having regard to all of the circumstances of the instant case, we conclude that this is not a case (such as the *Dutch Boy* case was) in which one employer goes out of business and another, purchasing all the substantial assets, opens for business at the same premises. Rather, this is a case in which an employer, changing the location of its business operations within a particular market area, disposes of certain unwanted premises and other assets to a competitor. In arriving at this conclusion, we have had regard, *inter alia*, to the fact that Steinberg's retained the services of certain of its employees, who were transferred from Whitby to Oshawa. This is consistent with the conclusion that Steinberg's has not disposed of its business in the majority of the Board in the *Dutch Boy* case that the differences or similarities in employment forces as between "predecessor" and "successor" employers would not otherwise be relevant to the issue.

A lease and equipment also changed hands in *Zehrs Markets Limited*, [1974] OLRB Rep. May 331, but goodwill was dissipated by a lengthy hiatus as between the predecessor's closing and the opening of the successor's store. Once again the Board found no sale of a business:

22. However, in this case the premises had been closed for a lengthy period of time and signs had been placed on the premises advertising that it was for rent. This would indicate to habitual and prospective consumers not only that Busy B had gone out of business, but also that any other interested third party willing to take possession of the premises would be free to operate a business other than a retail food business at that location. Thus, the signs of the premises together with the lapse of time between the closing of Busy B and the opening of Zehrs indicate a sufficient termination of operations, that little, if any, goodwill arising from the location would accrue. While location *per se* is a significant factor in the retail food industry, because of the consumer habit of attending at a particular locale, the facts in this case are such that any benefit derived from local *per se* had been dissipated.

23. Accordingly, we determine that the assignment of lease and the transfer of the assets in this case does not constitute a sale of business in the sense that there has not been a continuum of the business or the enterprise within the meaning of the Act. The application is dismissed.

30. But assets and customers together do constitute a business. There are several cases in which the Board has enforced collective agreements and bargaining rights against a successor who purchased all or most of a predecessor's assets and began to service its former clientele. A review of some of these decisions demonstrates that a successor may acquire its predecessor's customers in several different ways. Two that are obvious are a covenant not to compete and the purchase of a name or trademark. In *Dennis Moran Limited*, [1977] OLRB Rep. Apr. 237, the successor bought virtually all of the predecessor's assets – including a gravel pit, equipment and licences – as well as its name. However, the Board has recognized that customers can pass between employers by other means. The habits of consumers with respect to grocery stores were discussed in *Dutch Boy Food Markets*, 65 CLLC 16,051, in which a store lease and all leasehold improvements passed between employers:

Had Kitchener Food only purchased the contents of the premises at 274 Highland Road and moved them into other premises we would have no difficulty in finding that the transaction was only the sale of assets. In the instant case, however, Kitchener Food acquired not just assets, but Steinberg's entire interest in the premises. Stated another way Steinberg's disposed of its entire operation in the Kitchener area which obviously must have had some effect on its operations in Ontario. If by the terms of the transaction Steinberg's had been restricted from carrying on business in the same area we would have no hesitation in saying that there was a sale of a "business" within the meaning of section 47a [now 63] of the Act. The absence of such covenant, however, is not by any means conclusive that there was not a sale of a "business".

A retail food supermarket, unlike some other businesses, has no customer orders or lists which can be transferred to a purchaser who intends to carry on the same type of business. By the very nature of a retail food business, with the exception of the name, a vendor has no goodwill which he can effectively give or withhold from a purchaser. The success of a food supermarket is dependent, on large measure, upon the support of the people who live in the area in which the store is located. *Accordingly, any goodwill consists in the habit of customers of the vendor continuing to patronize the food market located on the same premises. If there was any goodwill to be acquired by Kitchener Food it was inherent in the premises themselves in which Steinberg's had carried on the same type of business as that carried on by Kitchener Food.* Accordingly, the exemption of goodwill from the purchase price, in our opinion, has no real meaning.

(emphasis added)

The peculiar nature of customer relations in the storage business was acknowledged in *Big Bear Storage*, [1979] OLRB Rep. Mar. 164, a case involving the transfer of a warehouse lease and associated equipment:

10. In this case the respondent purchased certain assets of the successor (two motors, racks, office equipment) necessary to the operation of a warehouse business and in a separate transaction acquired leased access to the same premises as the predecessor under almost identical terms and conditions. The significance of the second transaction cannot be overstated in the context of the warehousing industry where *goods stored on the premises by the predecessor's customers remain there as of the date the successor occupies these premises.*

(emphasis added)

In all of these cases, both assets and clientele passed from one employer to the other, and a sale of a business was found to have occurred.

31. In *Bermay Corporation*, [1979] OLRB Rep. July 608 the Board ruled that assets and management personnel comprise a business. The predecessor purchased the successor's

lease, equipment and materials, and employed its office foreman and two of its five production supervisors:

16. When the replacement of one undertaking by another is marked by a continuity of production and sales in the same area of endeavour, out of the same location using the same physical equipment and human resources to do the same kind of work, the Board may conclude that there has been the sale of a business. In this instance the premises of 920 Caledonia Drive previously occupied by Goldcrest for the purpose of manufacturing furniture are now occupied by Bermay for the purpose of manufacturing the same kind of furniture. There are virtually no hiatus in production save for a few days' adjustment period to change over from the manufacture of Goldcrest products to the manufacture of Sealy products. At the time of the transfer the equipment and raw materials used by both companies was substantially the same and a number of the employees and production supervisors used by both companies was and continues to be the same. In substance the respondent has taken over an essential part of its predecessor's business – its production capacity and location. *While the respondent did not acquire its predecessor's name, goodwill or customers, it nevertheless acquired both capital and human resources which were an intrinsic part of the business of Goldcrest Furniture Limited.* From the standpoint of a production employee very little has changed; a worker who continues to work in the same location on the same machinery using the same skills to make the same kind of materials into the same kind of product could not be faulted for concluding that the business in which he continues to work has been transferred from one employer to another. In the light of all of the foregoing the Board therefore finds that the transactions in question constitute the transfer of part of the predecessor's business within the meaning of section 55 [now 63] of *The Labour Relations Act*.

(emphasis added)

32. Often the successor acquires the predecessor's assets, and begins to service its customers, without any direct dealings between the two employers, but that had not deterred the Board from finding a sale pursuant to section 63(1). Situations of this type were reviewed in *Metropolitan Parking Inc.*, *supra*, at para. 28:

The Board has found a transfer of a business, through a "chain" transaction, or sequence of sales (*Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691; *Trenton Riverside Dairies*, [1964] OLRB Rep. May 72), a corporate reorganization and merger, (*Eaton Yale Ltd.*, [1971] OLRB Rep. Oct. 667; *Westeel-Rosco Ltd.*, [1966] OLRB Rep. Dec. 718) and through the offices of a receiver where "the business" has been transferred as a going concern (*Marvel Jewelry Ltd.*, [1975] OLRB Rep. Sept. 733; *Field-Price Ltd.*, [1973] OLRB Rep. Oct. 543; *Parnel Foods Ltd.*, [1971] OLRB Rep. Nov. 715.) The manner of disposition is irrelevant so long as a transfer has, in fact, taken place. The interposition of a third party, acting as an agent or conduit, does not affect the result.

VI

33. To this point the focus has been on private enterprise. The introduction of government, either as economic regulator or as a party to commercial agreements, gives rise to new considerations. A licence issued by one level of government or another is required to carry on many types of commercial activities; including transportation, broadcasting, communication, and health services, to name a few. Other sorts of businesses are ancillary to public enterprise, and so are dependent upon a contractual arrangement with government. For example, the federal government operates airports and contracts for the provision of food services at air terminals. The role of the state in our twentieth century economy creates new forms of property, licences and government contracts, property that is essential to the life of a business. An intraprovincial trucking firm cannot operate without licencing approval from the Ontario Highway Transport Board, and a catering company cannot offer food services in an airport except by agreement with the federal crown. From time to time, this new property passes from one employer to another, and the Board is called upon to apply section 63.

34. This is what happened in *Thunder Bay Ambulance Services Inc.*, [1978] OLRB Rep. May 467. Two hospitals had operated separate ambulance services in the same city, but the Ministry of Health determined this was an inefficient arrangement. The hospitals were not prepared to enter into an amalgamation, deciding instead to discontinue their services. The Ministry called for bids, and the successful applicant was the former director of ambulance services at one of the hospitals. All vehicles and ancillary equipment, but not linen and toiletries, previously used by the two hospitals were owned by the provincial government and were passed on to the new licensee. The Board concluded a business had been sold:

17. In view of the Board, the two essential elements of the predecessor's businesses were transferred to the alleged successor. Firstly, the exclusive use of the assets owned by the Ministry of Health was transferred. Although the same licence or piece of paper was not transferred between the two, the Board has no hesitation in finding that the exclusive entitlement, as embodied in a Ministry of Health Licence, was transferred. Secondly, the predecessors' management and orgaions filled by the same persons as were employed by the predecessors must weigh heavily with the Bopredecessors' ambulance operations were largely managerial and organizational in nature and it follows that the transfer of managerial skills, albeit through a request for proposal system and competition, and the continuation of identical job functions filled by the same persons as were employed by the predecessors must weigh heavily with the Board.

18. Having regard to the transfer of the exclusive right to use the Ministry's assets, to the transfer of managerial skills and to the uninterrupted continuation of the identical job functions, the Board must conclude that the Ministry of Health, the entity charged with maintaining an ambulance service in the Municipality of Thunder Bay, did not facilitate the establishment of a similar or parallel business but rather it served as the necessary link in the transfer of the predecessor's businesses to the successor. It is the finding of the Board, therefore, that a sale of a business within the meaning of section 55 has occurred and that the bargaining rights of the union, which were established in respect of the predecessors' busi-

nesses, should be preserved. The applicant trade union was entitled to give notice to the predecessors under section 45 of the Act and accordingly, the Board declares, pursuant to the provisions of section 53 of the Act, that the trade union is entitled to give the respondent a written notice of its desire to bargain with a view to making a renewal collective agreement.

(emphasis added)

35. The contrary conclusion was reached in *Metropolitan Parking Inc.*, *supra*. The predecessor operated an airport parking lot pursuant to a three-year contract with the federal government. The lot and virtually all equipment were owned by the government which also supplied maintenance and snow removal services. All monies collected from customers were remitted to the crown, and the operator received a fixed fee for its services. When the three-year term expired, and a new contract was let by public tender, the predecessor's bid was less attractive to the crown than the successor's. The successor hired the predecessor's general manager at the airport lot and six of its supervisors, but "real management authority" in the organization of both employers resided at a higher level. The Board distinguished the facts in this case from the situation in *Thunder Bay Ambulance*, *supra*, on three grounds. First, the contract to operate the parking lot was limited to a three-year term, whereas the ambulance licence was not temporally restricted. In addition, all of the successor's "know how" was derived from the predecessor's organization in *Thunder Bay Ambulance*, *supra*, in the person of the former director of ambulance services at one of the hospitals, but not in the later case. Finally, the two parking lot operators competed for the government contract, but the hospitals voluntarily relinquished their licence to their successor.

VII

36. The case at hand is not on all fours with either of these two earlier decisions. In contrast to *Metropolitan Parking Inc.*, *supra*, a nursing home licence is a long-term arrangement. Although a licence must be renewed annually, all concerned clearly contemplate that Riverview will be granted the legal authority to operate a nursing home for many years to come, unless its licence is voluntarily relinquished. This licence is decidedly different than a parking lot contract that is let, at three-year intervals, to whoever submits the lowest bid. Assuming that the word business connotes some degree of permanence, we find this criteria to be satisfied here. Unlike *Thunder Bay Ambulance*, *supra*, there has been no transfer of management personnel between Balmoral and Riverview.

37. As there is no precedent which exactly matches this case, we are driven back to the general language of the statute and the basic principles the Board has developed to guide the application of section 63. The nature of the work performed at Riverview Manor is not substantially different from what was done at Balmoral Lodge. Consequently, Balmoral's work force and collective agreement are not ill suited to Riverview. Riverview would of course prefer to be free to select its employees according to its own standards, but this is true of many successors, and to bow to this preference would be to negate section 63. The Daynes organization was not able to meet its manpower needs in August, 1983 at Riverview Manor and other homes with its existing work force. New employees were hired, employees who had no claim to *continued* employment. On the other hand, all of Balmoral's employees were terminated at the time one home closed and the other opened.

38. This is a typical hard case, the entrepreneurial freedom of both employers is pitted against the employment security of the predecessor's work force. The Board's determination as to whether or not a business has been sold will allow one to prevail over the other. Applying section 63 to the unregulated private sector, the Board has consistently ruled that a successor who acquires all or most of a predecessor's assets and its customers, also inherits a trade union and any collective agreement. The same criteria ought to be applied to the case at hand, and lead us to the conclusion that a business has been sold. As to customers, the vast majority of the former residents of Balmoral Lodge are now residing at Riverview Manor. That is not surprising. An employer who gives up a licence or government contract, voluntarily or otherwise, can no longer service its former clientele. Along with the licence or contract, the successor often receives a captive market that is free of competition, not only from the predecessor, but also from others who lack the necessary authorization to carry on business. Riverview obtained two major assets from Balmoral, the licence and the land. The transfer of the licence is particularly significant, because it led most Balmoral residents to move to Riverview Manor. (Both parties to the transaction contemplated residents would move from one home to the other, as evidenced by the contract that ties the date from which interest runs to the transfer of patients.) In this sense, the licence is the essence of the business. There was little else Balmoral could have conveyed to Riverview. Balmoral Lodge could no longer be used as a nursing home, and Balmoral's only other assets were equipment and supplies. The transfer of the licence was subject to the approval of the Ministry of Health. But the role of this third party is of no relevance: see the cases referred to at paragraph 33, *supra*.

39. Two arguments made by counsel for Riverview remain to be addressed. He contended his client had not acquired Balmoral's business, because the Daynes organization follows very different practices and policies than these previously in effect at Balmoral Lodge. No doubt, there has been a substantial change in management style, but this is not sufficient to overcome the transfer of the licence, land and residents. In addition to the cases referred to above, counsel relied upon *Ottawa Truck Centre*, [1982] OLRB Rep. Nov. 1704, but in that case the successor purchased only a very small portion of the predecessor's assets, and there was no assurance of a continuity of customers. This case is clearly distinguishable.

40. We find the transaction between Balmoral and Riverview constitutes a sale of business within the meaning of section 63 of the *Labour Relations Act*.

DECISION OF BOARD MEMBER J.D. BELL;

1. I disagree with the decision of the majority.

2. It is my opinion that this case is not like *Thunder Bay Ambulance*, *supra* except in one sense i.e., it must be licensed by the government in order to exist. In *Thunder Bay*, *supra*, the licence, the physical assets, the management expertise, the staff and the site of operation all changed hands at once without a minutes interruption in the services.

3. This case is most similar to *Metropolitan Parking*, *supra*, where the only thing that changed hands was the right to operate the parking lot. The decision to change operators was based on the competitive bid system.

4. In this case the only thing that changed hands was the right to operate fifty-one beds in a nursing home. This reason for the change was that Balmoral failed to meet the standards

set by the licencing body and was advised its licence would not be renewed. Riverview made a bid to Balmoral and to the licencing body for the right to operate the fifty-one beds in question. Its success in receiving these operating rights was based on its ability to meet all the standards of the licencing body and to satisfy the economic demands of Balmoral. The purchase of the land referred to in the majority decision was incidental to the arrangements and should not be considered a factor in the decision.

5. Therefore I would find that a sale, under the terms of section 63 of the Act, did not occur and I would dismiss the application.

0800-83-R; 0801-83-R; 0840-83-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 461, Applicant, v. **Shaw Festival Theatre Foundation, Canada**, Respondent, v. Employees, Objectors

Membership Evidence – Whether constitution required exams as condition of admission to union – Whether failure to conduct exams invalidating membership evidence – Whether failure to levy full \$300 initiation fee as per constitution invalidating membership – Constitution imposing residency requirement – No evidence that anyone denied membership on basis of residency – Loan from officer to employee signing membership on condition of repayment not affecting validity of membership

BEFORE: George W. Adams, Q.C., Chairman, and Board Members F. S. Cooke and M. Eayrs.

APPEARANCES: *T. W. G. Pratt, Nick Perehinchuk, John Vanidour and David Taylor for the applicant; P. Israel, D. Feldberg, J. E. Wilber and P. Reynolds for the respondent; and Janet Shearn, objector.*

DECISION OF THE BOARD; September 20, 1983

1. These three applications for certification are consolidated in light of the applicant trade union's agreement that one instead of three bargaining units would be appropriate in the circumstances. This position was taken by the respondent employer from the outset of these matters.

2. The applicant was advised that it had not established its status before the Board in any previous proceedings and that it should be prepared to do so in the instant matter. Having regard to the evidence before us, we are satisfied the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. Its charter was originally issued by its parent union in October of 1916. The parent's name is now the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (hereinafter referred to as "IATSE"). The local applicant's constitution and by-law were adopted most recently in 1979. It has a geographic jurisdiction covering "the Golden Horseshoe" area or the Niagara Peninsula. It has duly elected officers and conducts regular

meetings according to its constitution and by-laws. It has a collective agreement with the respondent covering other employees.

3. The application pertains to the activities of Shaw Festival and the applicant asserts that it is entitled to the unit it seeks as a matter of law having regard to the mandatory language of section 6(3) of the *Labour Relations Act* dealing with "craft" bargaining units. The bargaining unit sought under this subsection is framed in terms of "all stage employees of the respondent employed at Niagara-on-the-Lake in the Province of Ontario save and except those covered by subsisting collective agreements, those employed in the Wardrobe Department and those exercising managerial functions and employed in a confidential capacity in matters relating to labour relations".

4. The classifications said by the employer to fall within the bargaining unit sought include wardrobe mistress, electrician, wig dresser, sound operator, crew hand, scenic artist, carpenter, and flyman. A clarity note would therefore be useful. However, the respondent employer claims that certain persons should be excluded from the bargaining unit by reason of exercising managerial functions and further submits that those employed in the Wardrobe Department ought to be included. This latter objection involves persons classified by the respondent as properties builder, tailor's first hand, tailor, furniture builder, jeweller, wig dresser, properties journeyman, dresser, cutter, seamstress, and properties buyer. In effect, the respondent challenges the craft basis to the application.

5. The respondent further asserts that the applicant has improperly admitted a number of employees into membership having regard to the applicant's requirements of residency and proficiency set out in its constitution. In the alternative, the respondent submits that the applicant's residency requirement is discriminatory and, because it violates the statute, the applicant cannot be certified. The respondent also challenges the applicant's membership evidence on the basis of an improper waiving of the normal membership fee and on the basis of a loan made to one of the bargaining unit employees. Finally, the respondent challenges the timing of the application on the basis that the respondent's activity is seasonal.

6. Nick Perehinchuk, Business Agent for the applicant local, testified that people usually go through an apprenticeship and because the Shaw Festival is only five or six months long the local had stipulated a two-year apprenticeship for certain skilled trades like carpenter or electrician unless the person was previously qualified. Where an apprenticeship is being served, tests are administered by the local and, indeed, may be administered to any applicant in order to assess qualifications. Mr. Perehinchuk testified that the object of an apprenticeship program was to permit the applicant to supply competent people to employers with whom it has collective bargaining relationships. Mr. Perehinchuk testified that with respect to the residency requirement, "New York" (the parent trade union) had approved all of the applications for membership relevant to this application save for one. Mr. Perehinchuk subsequently testified that he applied for and received a waiver of residency for this one particular individual. No waiver was sought for any other employee. Mr. Perehinchuk could not say whether the local had verified the term of residency stipulated by each applicant on her membership card. He further admitted that the applicant local did not test the bargaining unit employees seeking membership in order to assess their level of qualifications. He testified that the applicant relied on the fact that the respondent had hired these people to perform the work they were performing. On this basis the applicant assumed that all bargaining unit employees were qualified. Mr. Perehinchuk further testified that most of the applicants paid \$25.00 on the

signing of a membership card and have not yet paid the full initiation fee of \$300.00. He agreed that the local had not formally altered the initiation fees or dues set out in its by-laws. He testified that he was doing something he had never done before, i.e. seeking certification for a group of people who “came to (him) for representation”. Mr. John Vanidour, Secretary-Treasurer of the local, testified that the usual membership application form was employed in signing up bargaining unit employees. A number of the employees were “old members”, having held cards for some time. Another group of employees were new members whose application cards had been processed “by New York” and issued cards. They, apparently, had paid \$150.00 which is the applicant’s apprenticeship initiation fee. Another group of applicants have paid only \$25.00 and will not pay anymore until this Board releases their membership application forms so that they can be sent to the parent in New York State. The applicant held a special meeting on July 31st whereby it purported to accept such persons as full members. Mr. Vanidour testified that the applicant has never had anyone apply for membership who did not meet the residency requirement prior to this group of employees applying. On the membership evidence before the Board it is unclear whether any of the employees who have executed membership evidence failed to comply with the residency requirement as understood by IATSE other than the one employee for whom the applicant sought a waiver. This is because of the way the documents have been filled out. But, as we decide below, nothing turns on this ambiguity.

7. Mr. John W. Wilbur, Production Manager for the respondent, testified. He stated that most of the employees “come from outside” the applicant’s geographic area of jurisdiction and that to the best of his knowledge at least 18 of them could not be considered to meet the residency requirement of 18 months. Mr. Joey Harkness also testified. He is now employed by the respondent as part of a set-up group and works within the bargaining unit claimed by the applicant. He testified that he was approached by the Secretary of the local trade union and asked if he would “put in an application”. At the time he did not have \$25.00, and was therefore loaned the money by the trade union official. He said he has to pay it back and that he intends to do so. He said he did not believe he was a member of the trade union yet.

8. Article III of the local’s Constitution reads:

Article 111 Membership

Section 1 – Qualifications for Membership

Applicants for membership in this Local must be employed in the theatrical, television or moving picture industry in occupations within the jurisdiction of this Local or must be capable of obtaining such employment, and must possess sufficient experience and ability to pass a reasonable examination upon the particulars of their respective crafts.

Such applicants must be of good moral character and reputation and, unless waived by the International for proper cause upon application by the Local, must have been residents for at least eighteen months preceding their application within its jurisdiction. The applicants must also be of legal age to engage in gainful employment within the jurisdiction of this Local.

There shall be no discriminating against any person in respect to mem-

bership in this Local by reason of race, colour, creed, national origin, sex or age.

Section 2 – Application for Membership

Every application for membership must be made upon the official printed form supplied by the International to the Local.

The endorsement of the application by the General Secretary-Treasurer of the International must be obtained before any action is taken by the Local upon the admission of the applicant, and if endorsement is refused the applicant shall be rejected.

Each application blank must be accompanied by the initiation fee as stated in Section 4 of the By-Laws (to be returned if the application is rejected). Any applicant who is guilty of making false statements upon the application blank shall, if admitted to membership, be expelled upon conviction and shall be thereafter denied admission to membership in this Local. Any initiation fee paid by such members shall be forfeited upon expulsion.

Section 3 – Examination of Applicants

Applicants for membership may, if so decided by the Body, be required to pass satisfactory examination as to competency and qualifications. If required, such examination shall be before a Board of Examiners, consisting of or appointed by the Executive Board, and the examination shall be uniform for all applicants. The approval of the Board of Examiners is essential before further action is taken.

Section 4 – Balloting on Applicants

Having complied with all the requirements of the International and this Local, the applicant may then be proposed for membership at a regular meeting of the Local. The applicants shall not be present when their names are proposed and open discussion shall be permitted. The members of the Local shall then proceed to ballot upon the applicants and a majority vote of the members present shall be required for the acceptance of the applicants.

Section 5 – Obligations of Membership After acceptance, new members shall pay to the Treasurer the current quarterly dues and assessments and take the pledge as dictated to them by the President of the Local.

Article X reads:

Article X

Altering or Amending the Constitution

Alterations or amendments to this Constitution shall be made in writing and have three readings at three consecutive regular meetings, at the last of which same must receive the favorable vote of at least two-thirds of the members present. No such alteration or amendment shall however, be effective until it is endorsed by the International President.

9. Section 4 of the By-Laws provides:

Section 4 – Dues and Initiation Fee

The quarterly dues of this Local shall be twenty dollars (\$20.00) payable in advance.

The initiation fee shall be three hundred dollars (\$300.00) with two hundred dollars (\$200.00) paid upon application for membership and the balance of one hundred dollars (\$100.00) to be paid before the applicant can be taken into the Local and issued a membership card.

10. Section 23 of the By-Laws provides:

Section 23 – Alteration of By-Laws

No portion of these laws may be suspended, but may be amended or altered by a resolution approved by a majority of the members present at the first meeting in January each year after the members have been properly notified. All changes must be approved by the International President before they can be implemented.

11. We would first note that section 3 of Article 111 does not make examinations as to competency and qualifications mandatory. Accordingly, we see no reason why the applicant had to administer examinations or that its failure to examine applicant employees was fatal to the validity of the membership evidence filed with the Board. The respondent hired these employees and the applicant seeks to represent them. Because the employees have already been hired, any tests would be entirely redundant. The respondent also objects to the failure of many of the bargaining unit employees to pay the full \$300.00 initiation fee. Section 1(1)(l) defines a member when used with reference to a trade union to include a person who:

(i) has applied for membership in the trade union, and

(ii) has paid to the trade union on his own behalf an amount of at least \$1.00 in respect of initiation fees or monthly dues of the trade union

and “membership” has a corresponding meaning....

This provision of the statute is not subject to the terms of a constitution or by-laws of an applicant trade union. It is a provision which recognizes the nature of the organizing process and the procedural speed required by it. Both are very often out of tune with the formal constitutional procedures for admission into a trade union. To this extent, a trade union is able to take advantage of the minimum statutory membership requirements of the statute if it wishes. By its conduct, the applicant obviously was seeking to rely on the statute and not on the specific requirements of its constitution. This aspect of the respondent’s objections must fail.

12. With respect to the residency requirement, we are also of the view that the respondent’s objections cannot prevail. There is no evidence that anyone in the bargaining unit was denied membership in the applicant trade union by virtue of the requirement. We further

note that while the Board has stated that a union must be capable of admitting into membership every employee in a bargaining unit, the courts have cautioned the Board's intervention in this general area. See *Gaymer and Oultram* 54 CLLC ¶17,073; and *Central Hospital*, [1982] OLRB Rep. Apr. 382 and compare *CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498. At this time it is enough to observe that any concern over the future application of the residency requirement, particularly if there is an impact on an employee's job security, may be the subject of a complaint before this Board. We are also of the view that the residency requirement does not violate one of the prohibited grounds set out in section 13 of the *Labour Relations Act*. Finally, we are satisfied that the loan to Mr. Harkness was a bona fide transaction. The witness testified that he intends to repay the loan. See *Skene Cartage Company*, [1966] OLRB Rep. Apr. 30; and *William H. Rorer*, [1973] OLRB Rep. Sept. 483. Mr. Harkness is therefore a member of the trade union for the purposes of this application by reason of section 1(1)(p) of the Act.

13. Having regard to these findings the Board directs that this matter be relisted by the Registrar to deal with the issue of the appropriateness of the bargaining unit, the respondent's claim that the seasonal nature of the work makes the application untimely, and all other outstanding matters. The Board further directs and appoints a labour relations officer to forthwith confer with the parties and inquire into and report back to the Board with respect to the lists of employees filed by the respondent, the lost cards of the applicant, and the duties and responsibilities of those persons the respondent claims to exercise managerial functions. The inquiry into the lists and lost cards must be completed before the Board can assess the extent of trade union membership in the bargaining unit for the purposes of section 6(2) of the *Labour Relations Act*. Accordingly, these two matters should be dealt with by the officer first.

14. This matter is referred to the Registrar to be scheduled for hearing on all outstanding matters as described herein.

0219-83-U Canadian Union of Public Employees, Local 79, Complainant, v. The Corporation of the Municipality of Metropolitan Toronto, Respondent

Discharge for Union Activity – Unfair Labour Practice – Casual employee discharged for misconduct – Discipline not disproportionate to misconduct – No room for inference of unlawful motive – Employer satisfying Board no anti-union motive involved

BEFORE: R. D. Howe, Vice-Chairman, and Board Members E. J. Brady and H. Kobryn.

APPEARANCES: *J. David Watson, M. Harper, Anne Tonks and Jack DeBoer for the complainant; Janice D. Johnston, George Coleman and Vilma Kalu for the respondent.*

DECISION OF THE BOARD; September 16, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant trade union (the “Union”) alleges that the respondent contravened sections 3, 64, and 66 of the Act on or about April 19, 1983 by terminating the employment of the grievor, Anne Tonks.

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3. Mrs. Tonks is a Registered Nurse who commenced employment with the respondent in the Homes for the Aged Division of its Community Services Department on May 26, 1982 as a casual nurse at Cummer House Home for the Aged (the “Home”). When she hired the grievor, Vilma Kalu, the Home’s Director of Nursing, explained to her that casual employees are hired to fill in on short notice for permanent and temporary employees who are absent from work (due to illness, vacation, maternity leave, etc.) Mrs. Kalu also made the grievor aware of the fact that cancellation of casual employee hours often occurs on short notice, such as where the permanent or temporary employee whom the casual fits, and gradually came to feel resentful and frustrated about the fact that she was not scheduled to work as many employment, Mrs. Tonks made it known to management that she was anxious to work as many hours as possible and that she hoped to ultimately obtain a full-time position with the respondent. Since the Home’s greatest needs for casual employees occur on night and weekend shifts, the grievor was scheduled to work a substantial number of such shifts. While the grievor was content to work some night and weekend shifts, she was also desirous of obtaining some day shifts, and gradually came to feel resentful and frustrated about the fact that she was not scheduled to work as many day shifts as she thought appropriate.

4. Although the grievor’s nursing performance was adequate, Mrs. Kalu was advised in February 1983 by a memo from one of the Home’s Dietary Supervisors that the grievor had been “causing a few problems in the cafeteria” and upsetting some cafeteria employees by her actions of coming to the cafeteria and demanding service shortly before its scheduled closing times, and by refusing to leave the cafeteria after it closed for cleaning purposes. It appears from the evidence adduced before as in respect of those incidents that there may well have been some fault not only on the part of the grievor, but also on the part of some members of the cafeteria staff. However, it is unnecessary to make a conclusive determination with respect to that matter; it is sufficient for the purposes of this decision to note that management viewed the matters to be of sufficient importance that Isolyn Jackson, the Home’s Assistant

Director of Nursing, called the grievor in for a meeting, advised her that her unsatisfactory attitude toward the cafeteria staff would not be tolerated, and warned her that if any other incidents occurred, further steps would have to be taken.

5. The incident which triggered the grievor's termination occurred on Sunday, April 3, 1983. When she arrived at work at 3:00 o'clock that afternoon, the grievor was advised that the day shift which she had been scheduled to work on Tuesday, April 5th had been cancelled since the Home was overbooked with R.N.'s for that shift. When the grievor received that information she became extremely upset and demanded to know if she was "the last one scheduled or called in". When further discussion indicated that the Home was unable or unwilling to meet her demand that someone else be cancelled so that she could work the April 5th day shift, the grievor indicated that she would not be in on the evening shift that she had been scheduled to work on Thursday April 7th, nor on the Saturday April 9th and Sunday April 10th shifts that she had been scheduled to work. Having regard to all the evidence, we have no doubt that the grievor cancelled those three shifts as an act of retaliation against the respondent for cancelling her April 5th day shift. Although, as it turned out, the respondent did not have any real difficulty in finding a replacement for the grievor on those shifts, management nevertheless, not unreasonably, characterized her retaliatory action as irresponsible, unprofessional, inconsiderate, and unacceptable. It is clear from the evidence that the shifts which the grievor cancelled are often among the most difficult ones for which to find replacements. Thus, the grievor's precipitous act could well have caused the Home to be understaffed on those shifts and could, therefore, have adversely impacted upon resident care.

6. Mrs. Kalu received a written report concerning that incident early the next morning from one of the relief supervisors who had witnessed it. She then met with Frederick Fishenden, the Home's Administrator (and senior member of management) to discuss that matter and other matters (not relevant to the present proceedings) pertaining to the operation of the Home. After reviewing the facts of the incident and the grievor's employment record, Mr. Fishenden concluded that the grievor's employment should be terminated since he found her action, and the attitude which prompted it, to be "unprofessional, irresponsible, inconsiderate, and quite unacceptable". Although Mrs. Kalu agreed, she persuaded Mr. Fishenden to permit her to meet with the grievor to hear "her side of the story", and to determine if there was any remorse on the grievor's part or other indication that she was prepared to change her attitude.

7. After meeting with Mr. Fishenden, Mrs. Kalu spoke with the two alternate supervisors who were present on April 3rd when the grievor cancelled her three shifts on April 3rd "to be sure [she] had [her] facts correct". She then discussed the matter with Sandra Prittes, the Manager of Residents Care, who was also of the view that termination was the appropriate response to the grievor's action.

8. Meanwhile, the grievor had attended at the Home at approximately 10:00 o'clock on April 4th and presented the following letter to Mrs. Jackson:

I am available as you know for *all shifts* as I work nowhere else and I need the work!! My preference is full time employment or two part-time jobs as I have to work to support myself.

I prefer days but of course I will *help out and do my share* of EVENINGS AND WEEKENDS!! So while I am available full time as I am now and have been since last May, please consider assigning me for *days* and work in the middle of the week *too*, not just evenings and week ends. PLEASE!!

I do need to spend some time with my family and friends on weekends and in the evenings.

If a *full time position* became available no matter what shift, I would certainly take it but I understand the “freeze” on employment.

Thank you for your consideration

(signed) (Mrs.) Anne Tonks R N

Shortly after receiving it, Mrs. Jackson gave that letter to Mrs. Kalu.

9. After several unsuccessful attempts to contact the grievor by telephone, Mrs. Kalu eventually made contact with her on April 8th and arranged for the grievor to meet with her later that day. However, the grievor phoned back and asked if the meeting could be rescheduled since she had another appointment at that time. Accordingly, Mrs. Kalu arranged to meet with the grievor on April 11th. There are case, and what inferences may reasonably be drawn from the totality of the evidence. Having regard to those factors. In resolving those conflicts and making our other findings of fact in this decision, we have considered a number of factors including the firmness of the witnesses' respective memories, their ability to resist the influence of interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and what inferences may reasonably be drawn from the totality of the evidence. Having regard to those factors, we prefer and rely upon the evidence of Mrs. Kalu where it conflicts with that given by the grievor.

10. The grievor came to the meeting with Mrs. Kalu on April 11th expecting to be told that management had arranged to give her more day shifts and fewer night and weekend shifts. Thus, she was surprised and annoyed when Mrs. Kalu began to question her about the April 3rd incident. Although she did not deny the incident, the grievor attempted to pass it off as a trifling matter of little importance, which should not be of any concern to Mrs. Kalu. As the discussion continued, the grievor became increasingly angry and reiterated her position that someone else should have been cancelled on the Thursday (April 5th) day shift rather than herself. Far from apologizing for her retaliatory act of cancelling her other three shifts, the grievor made it quite plain to Mrs. Kalu that if the Home ever again cancelled a shift that had been pre-booked for her, she would do exactly the same thing. That meeting, at which Mrs. Kalu also referred to the aforementioned cafeteria incidents, continued for approximately three hours. Mrs. Kalu, who was “totally floored” by the grievor's attitude, told her that she would not be scheduled to work any further shifts until after Mrs. Kalu had discussed the matter with Mr. Fishenden. As the grievor was leaving, she commented that Mrs. Kalu seemed to have “a lot of documentation” and expressed the view that she would like to have her own documentation. Mrs. Kalu, who by this time had managed to calm the grievor down, indicated that she thought that was a good idea. The grievor then said in a pleasant, non-threatening

manner, "I think I'll need some advice as to this documentation. I think I will go to the Union. What do you think?" Mrs. Kalu replied that she could not advise the grievor as to whether or not she should go to the Union, but that she (Mrs. Kalu) did not have any problem with her seeking advice from the Union.

11. On April 13th Mrs. Kalu met with Mr. Fishenden, reported to him what had occurred during her meeting with the grievor on April 11th, and agreed with him that the grievor should be discharged. As a result of that joint decision, Mrs. Fishenden caused the following letter to be sent to the grievor on or about April 15th, 1983:

Following your meeting with Mrs. Kalu, Director of Nursing, regarding the incidents which have occurred in the past, culminating with the incident on the 3rd April, 1983, we have given this matter considerable thought and feel your attitude is totally unacceptable.

Since we require our casual staff to be available according to our requirements we feel that your services do not meet these criteria and you will therefore be terminated as of April 19, 1983.

12. It was submitted on behalf of the complainant that the respondent did not have "just cause" to discharge the grievor and that the absence of such cause should lead the Board to infer that the grievor was terminated for "some other reason". While he conceded that the respondent "does not have any general anti-union animus", counsel for the complainant contended that although Mrs. Fishenden and Mrs. Kalu did not in any way oppose the union's organizational campaign with respect to the respondent's casual employees, the Board should nevertheless infer that they terminated the grievor's employment in order to "clean house" before the Union obtained a "just cause" clause and grievance procedure which would make it more difficult to discharge an employee such as the grievor. In the alternative, he argued that even if the grievor's conduct was deserving of some disciplinary action, her discharge was so far out of proportion to her misconduct as to justify the Board's intervention through the adoption of a non-motive approach to section 64 of the Act in the circumstances of this case.

13. Section 89(5) of the Act provides:

On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

In *Charterways Transportation Ltd.*, [1982] OLRB Rep. Jan. 5, at paragraph 15, the Board wrote as follows:

The Board reviewed the general principles which govern in a case where the reverse onus established under section 89(5) applied in the recently reported *Alpha Laboratories Inc.*, case [1981] OLRB Rep. July 823. The Board reviewed these principles at para. 3 as follows:

“In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

‘... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.’

It is not the function of the Board in the present case to decide whether or not the respondent had just cause to discharge the grievors. Our jurisdiction is limited to determining whether the respondent discharged the grievors because they were supporters of the complainant trade union or were exercising any other rights under the Act (see *Toronto Star Limited*, [1971] OLRB Rep. Sept. 582, paragraph 11). This does not, however, preclude the Board from considering the context surrounding the respondent’s actions, as indicated by the Board in *Fielding Lumber Company* [1975] OLRB Rep. Sept. 665, at paragraph 19:

‘The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* – a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must be observed that in assessing an employer’s declared motivation due regard may be had to the peculiarities of the context surrounding an employer’s actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it.’

The nature of the determination to be made in cases such as the instant case and the factors to be considered by the Board in making such determinations are described as follows in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at paragraph 5:

‘In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer’s actions lie within his knowledge. The Board, therefore, in assessing the employer’s explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer’s knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti-union conduct and any other ‘peculiarities’. (See *National Automotic Vending Co. Ltd.* 63 CLLC 16,278)....’”

14. Counsel attempted to persuade the Board to place some weight on the fact that in January of 1983 the grievor spoke with the Home’s payroll clerk, who was also a Union stew-

ard, about her failure to receive overtime pay for working on Boxing Day. However, it is clear from the evidence that this incident played no role whatsoever in the respondent's decision to discharge the grievor. We are also satisfied that the fact that the grievor had joined the Union prior to her discharge, and told Mrs. Kalu that she was thinking about going to the Union for some advice about documentation, played no part in management's decision to terminate her. The respondent has enjoyed a collective bargaining relationship with the Union in respect of its approximately 2,000 full-time employees for a number of years. When George Coleman, the General Manager of the respondent's Homes for the Aged Division, became aware during the first week of March of 1983 that the complainant was attempting to organize the respondent's casual employees in that Division, he instructed the administrators and members of senior management in the seven homes in that Division, including Mr. Fishenden and Mrs. Kalu, to be co-operative and not to do anything that might hamper the Union's organizing efforts, since he felt that it was quite appropriate for casual employees to be represented by the Union. Mr. Fishenden and Mrs. Kalu not only accepted that view, but felt that it would be desirable from their point of view for the Home's casual employees to be represented by the Union since it would eliminate some of the tensions which had arisen from time to time between the unionized (full-time) employees, and the non-unionized (casual) employees. Neither Mr. Fishenden nor Mrs. Kalu knew that the grievor had joined the Union at the time they decided to discharge her. Nor were they in any way disturbed by the possibility that she might approach the Union for assistance in documenting her employment history since they both found that to be an appropriate action that she was fully entitled to take. Moreover, we accept without hesitation or reservation the candid and credible testimony of Mr. Fishenden that the grievor's discharge was not in any way motivated by a desire on his part to remove her from the employ of the Home before the Union obtained the right to grieve such discharges under a collective agreement "just cause" clause. We further accept his testimony that he would have discharged the grievor for the "unprofessional, irresponsible, inconsiderate, and quite unacceptable" attitude which she displayed on April 3rd, and for which she had subsequently demonstrated no remorse whatsoever, regardless of whether or not she was covered by a "just cause" clause. Accordingly, we are satisfied that the reasons given by management are the only reasons for the discharge of the grievor, and are not tainted by any anti-union motive.

15. In *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316, the Board indicated that it will be prepared in appropriate circumstances to adopt a "non-motive approach to section 64", such as in instances of "clear mistake" or "discipline clearly out of all proportion to the misconduct in issue", where a clear imbalance in favour of protected activity exists. However, the circumstances of the instant case do not fall within the parameters of section 64. There is no evidence from which it can be found or inferred that the respondent's discharge of the grievor, who was one of the approximately 900 casual employees employed by the respondent at its various homes for the aged, in any way interfered with the formation, selection or administration of the Union. Moreover, the grievor's retaliatory cancellation of her shifts, compounded by her subsequent assertion that she would do the same thing if the circumstances ever arose again, constituted serious misconduct. It does not appear to us that, in the circumstances of this case, the discharge of a casual employee with less than a year's service, which was itself not entirely unblemished, constituted discipline clearly out of all proportion to the misconduct in issue.

16. For the foregoof Theatrical Stage Employees and Moving Picture Machine Oper-

ators of the United States and Canada, Local 461, act contrary to the *Labour Relations Act* in discharging the grievor.

17. Accordingly, the complaint is hereby dismissed.

0300-83-M The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, Applicant, v. **Tri-Canada Inc.**, Respondent

Collective Agreement – Construction Industry Grievance – Whether agreement for use of union label and national minimum standard agreement for commercial pipe fabrication shop collective agreements – Whether constituting voluntary recognition agreement binding respondent employer to provincial agreement

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members I. M. Stamp and H. Kobyryn.

APPEARANCES: *Alex Ahee, Sean O’Ryan and Bill Weatherup for the applicant; no one for the respondent.*

DECISION OF THE BOARD; September 12, 1983

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board pursuant to section 124 of the *Labour Relations Act* for final and binding arbitration.

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3. The grievance as filed alleges that Tri-Canada Inc. (“the company”) is bound to the provincial agreement (“the Agreement”) between the Ontario Pipe Trades Council (“the Council”) and the Mechanical Contractors Association of Ontario (“MCA”) operative from August 16th, 1982 to April 30th, 1984. It alleges further that the company has violated the Agreement by failing to give proper notice to employees that no work was available and by failing to make proper payment in the absence of due notice.

4. The applicant (“Local Union 46”) has asserted in the referral that the company is bound to the Agreement and in asserting so is relying on the claim that the company is a party together with the United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada (“the United Association”) to two separate agreements:

- 1) Agreement for Use of United Association Union Label; and
- (2) National Minimum Standard Agreement for a Commercial Pipe Fabrication Shop.

Hereinafter those agreements will be referred to respectively as the Union Label Agreement and the Pipe Fabrication Shop Agreement and collectively as the international agreements.

5. The reply filed by the company states in part at paragraph 5 as follows:

Tri-Canada is a signator to a Fabrication Agreement with the International Union, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (AFL-CIO) and a "Union Label Agreement" with the same association.

The reply contends also that:

- (1) the company operates a manufacturing operation and there is no collective agreement between Local Union 46 and the company "... covering this manufacturing operation.";
- (2) "... the Mechanical Contractor's Association of Ontario does not bargain on behalf of manufacturers."; and
- (3) "There is no agreement, no jurisdiction under the Construction Industry Section of the Labour Relations Act.".

6. The company did not attend the hearing and was not represented at it. Counsel for Local Union 46 argued at the hearing that paragraph 5 of the reply was an admission of the company that it was bound together with the United Association to the Union Label Agreement and the Pipe Fabrication Shop Agreement. Having regard for counsel's argument and the company's statement in paragraph 5 of the reply, the Board made the finding orally at the hearing that the company was bound to the two aforementioned agreements with the United Association. The Board notes that Local Union 46 admits that it is not a party to those agreements.

7. Counsel for Local Union 46 argued further that the two agreements were each collective agreements in their own right and, as well, their terms operate independently and together to bind Local Union 46 and the company to the collective agreements flowing from a continuing collective bargaining process or processes, including in particular provincial bargaining between the parties to the Agreement; that is, the Ontario Pipe Trades Council representing, inter alia, Local Union 46 and the MCA representing, pursuant to section 143 of the Act, the company. By this means, counsel contends, the company and Local Union 46 are bound to the Agreement. In both respects, counsel relies in particular on the wording of Article IX – Wages and Working Conditions – Building Trades Journeymen of the Pipe Fabrication Shop Agreement which provides as follows:

The wage scales, working hours and fringe benefit payments, subject to the provisions of Article XI and conditions of employment (other than Trade and Work Jurisdiction, Article VIII) applicable to Building Trades Journeymen and Building Trades Apprentices covered by this agreement shall be those which have been established by bona fide collective bargaining between the local union of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United

States and Canada and the local employers' bargaining agent recognized by the Local Union in the area where the permanent commercial pipe fabricating shop is located.

Counsel argues also that Section 4 of the Union Label Agreement complements and reinforces the provisions of Article IX above. Section 4 states:

The Employer agrees, as a condition for granting of this license to use the United Association Union Label, that the Employer has signed and executed the National Minimum Standard Agreement for a Commercial Pipe Fabricating Shop with the United Association, and has a signed local collective bargaining commercial fabricating shop agreement with one of its affiliated local unions providing for the payment of building and construction wage rates, working hours and fringe benefits to building and construction trades journeymen and building and construction trades apprentices employed in the designated shop or shops under the terms and conditions established by a bona fide collective bargaining agreement between the local union and the local employer. The Employer agrees, as a condition of this Agreement, that he will pay the wage scale, working hours and fringe benefits applicable to the Metal Trades classification of employees covered by this Agreement which have been established by a bona fide collective bargaining agreement between the Employer and a local union of the United Association having territorial jurisdiction in the area where the Employer's permanent commercial pipe fabricating shop is located. This license to use a United Association Union Label is conditioned upon the Employer remaining in agreement with the local union covering the designated fabricating shop or shops. The Employer agrees to abide by and carry out the terms and conditions of the National Minimum Standard Agreement for a Commercial Pipe Fabricating Shop and the terms and conditions of the collective bargaining agreement between the local union and the local employers. A breach of any of the terms and conditions of the local union fabricating shop agreement or the National Minimum Standard Agreement for a Commercial Pipe Fabricating Shop shall be grounds for the cancellation of this United Association Union Label Agreement.

8. The company's fabrication shop is located within the geographic jurisdiction of Local Union 46 and the Board heard the evidence of Sean O'Ryan, its business manager, with respect to the relationships of the parties and the role of the two agreements between the United Association and the company. O'Ryan told the Board that the companies which sign the Union Label Agreement and the Pipe Fabrication Shop Agreement are usually mechanical contractors whose business has developed to a point where the contractor wants to establish a shop to fabricate piping assemblies for sale to other contractors or to clients instead of just for installation with his own forces. The contractor will apply to the head office of the United Association to become a party to the Union Label and Pipe Fabrication Shop Agreements. The international representative for the contractor's location will assess the contractor's equipment and facilities and, if satisfied that the contractor demonstrates the potential to be a fabricator of piping assemblies, has the contractor execute both agreements. The local union, for example Local Union 46, in whose geographic jurisdiction the shop is located has nothing to

do with that part of the procedure and has no authority to execute those agreements. One of the benefits claimed to accrue to a fabricator from signing these agreements relates to the geographic area which he can supply from his shop and have his piping assemblies accepted for installation by members of the United Association. If the contractor was simply bound by a construction collective agreement containing pipe fabrication shop provisions, he could supply pipe assemblies within the relevant local area without limit to the diameter of the piping, but outside of the local area it would be limited to piping greater than two inches in diameter. As a party to the Union Label and Pipe Fabrication Shop agreements, he can ship piping assemblies of any diameter outside of the local area.

9. According to O’Ryan, once the two agreements are signed between the pipe fabricator and the United Association, the local union does not negotiate a local collective agreement with the fabricator covering the building tradesmen and apprentices who fabricate the piping assemblies in the shop or for the building tradesmen and apprentices employed by the fabricator, if any, to install the products in the field. He cited the example of the six shops within Local Union 46’s geographic jurisdiction, none of which has a collective agreement with Local 46. It is satisfied as long as materials supplied from one of these shops is installed by building tradesmen and apprentices who are members of the United Association and are paid the wages and benefits of the relevant United Association collective agreement.

10. Pursuant to the two international agreements, the company is required to employ building tradesmen and apprentices to do the pipe bending, welding and assembly of piping systems in its fabricating shop. It employs for the purpose approximately 18 tradesmen and apprentices who are members of Local Union 46, amongst whom are included plumbers, steamfitters and welders. It may employ from time to time another four or five members, usually steamfitters, for field installation of its products. Local Union 46 has dispatched its members to the respondent within the three or four months preceding the filing of this grievance. O’Ryan claims that the referral procedure set out in the Agreement was followed in dispatching its members which allowed the company some latitude to hire by name.

11. Persons other than building tradesmen and apprentices employed by a shop fabricator for unskilled jobs such as materials handling would not be paid pursuant to the terms of a building trades agreement. If there was need for a collective agreement for this type of employee, it would be a separate metal trades agreement with the local union of the United Association holding geographic jurisdiction. The company is not a party to a metal trades agreement with Local Union 46.

12. Applicant counsel argues that the wording of Article IX of the Pipe Fabrication Shop Agreement must be read as having the effect of binding the parties to another or other collective agreements and that the company, the United Association and Local Union 46 all understood that to be the case. In support of that claimed understanding, counsel pointed to the fact that neither the United Association nor Local Union 46 entered into any other (counsel’s adjective) collective agreement following the execution of the two international agreements. That circumstance, counsel asserts, is indicative that the respondent understood it was bound by means of those agreements to other collective agreements between or binding upon, *inter alia*, Local Union 46 and local employers in the area where the fabricating shop is located and applicable to building tradesmen and apprentices, that is plumbers, pipefitters, steamfitters, welders and their apprentices, the trades represented by the United Association. The fact that the Pipe Fabrication Shop Agreement does not refer to the parties to it being

bound to collective agreements between specific parties or to one or more specific collective agreements which exist at a particular point in time, counsel suggests, arises from two aspects of its purpose. First, it is designed for uniform application in the United States and Canada and, as a consequence, must be broadly worded. Second, it is an agreement which is intended to endure over the years. Therefore, in order to satisfy those characteristics of the agreement, the parties purposefully bound themselves, by the words of Article IX of the Pipe Fabrication Shop Agreement, to the wage scales, working hours, fringe benefits and working conditions which are the end product of bona fide collective bargaining taking place from time to time between relevant locals of the United Association and employer representatives in the pipe trades.

13. Counsel argues further that Section 4 of the Union Label Agreement serves the same purpose and has the same effect, so that the one agreement reinforces the other. Should the Board not agree, counsel argues in the alternative that the language of Article IX and Section 4 of the respective international agreements is the stuff of which collective agreements are made and, when Article IX is read in the context of the whole Pipe Fabrication Shop Agreement, that document satisfied all of the requirements of the definition of a collective agreement in section 1(1)(e) of the Act and is a collective agreement.

14. The Board cannot agree with counsel that the Pipe Fabrication Shop Agreement is a collective agreement within the meaning of section 1(1)(e) of the Act. By means of Article IV – Recognition and Article VIII – Trade and Work Jurisdiction – Building Trades and Metal Trades Employee Classifications, that agreement purports to apply to employees of the company including building trades journeymen and apprentices performing work directly connected with the fabrication of pipe bends, welded pipe assemblies or pipe formations and employees employed in the metal trades classifications performing work in and around the shop associated with but distinct from the work performed by the building trades journeymen and apprentices. Article IX quoted above requires that building tradesmen and apprentices of the company, that is, those employees engaged in the fabrication of pipe bends, welded pipe assemblies and pipe formations, be paid the wage scales, working hours and fringe benefit payments “... which have been established by bona fide collective bargaining between the local union of the [United Association] and the local employers’ bargaining agent recognized by the Local Union in the area where....” the company’s fabrication shop is located.

Article X uses similar language to require that employees in the metal trades classifications receive the “... wage scales, working hours and fringe benefit payments, ... which have been established by bona fide collective bargaining between the Employer or his duly authorized representative and the local union of the [United Association] having jurisdiction in the area where” the company’s fabrication shop is located.

15. Article IX could be read as creating an undertaking of the company to pay wages and other working conditions established by some other collective agreement making the Pipe Fabrication Shop Agreement, were it to be a collective agreement itself, a “pick-up agreement”; that is a collective agreement where the parties agree to subsume into their agreement certain terms and conditions of a collective agreement between other parties, one of those parties being Local Union 46, the local union of the United Association having jurisdiction in the area where the respondent’s fabrication shop is located. If that were the case, the same could not be said with respect to the metal trades classifications. Article X is an undertaking to pay the terms and conditions of a collective agreement between the company and Local

Union 46. Should the Pipe Fabrication Shop Agreement be a collective agreement between United Association and the company covering employees in the metal trades classifications and should Local Union 46 and the company conclude a separate collective agreement also covering those classifications, the result would be two collective agreements covering the same group of employees, with the company a common party. That situation would be a clear violation of section 49 of the Act which requires that there be only one collective agreement at a time between a trade union and an employer. Furthermore the Act establishes the principle of exclusivity in respect of bargaining agents, therefore only one trade union can hold bargaining rights for a group of employees. Local Union 46 and the United Association are different trade unions under the Act as far as being bargaining agents of employees is concerned. For the company to have separate collective agreements with each of them for the same employees would violate that principle and could have the curious effect of causing a breach of section 67 of the Act by the company. Section 67(1) states that "No employer, ... so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with ... any trade union ... purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them."

16. While those circumstances alone might not invalidate the undertaking in Article IX in respect of the building trades journeymen and apprentices, and while it is open to argument that the parties to the Pipe Fabrication Shop Agreement intended it to be a collective agreement with respect to building trades journeymen and apprentices which picked up certain conditions of other collective agreements, or another one, and something else again for the metal trades classifications, it renders the parties' intent equivocal as to what that document is. Their equivocation is intensified by the repeated references elsewhere in that agreement, for example in Article VI - Hiring of Men Article VIII referred to above, Article XI - Fringe Benefit Payments and Article XXI - Strikes and Lockouts, to other collective agreements. Furthermore, the Board finds additional support for not viewing the Pipe Fabrication Shop Agreement as a collective agreement. The evidence before the Board is that that agreement and the Union Label Agreement go hand-in-glove; one not being signed without the other. Section 4 of the Union Label Agreement acknowledges that the respondent has signed the Pipe Fabrication Shop Agreement as a condition for the right to use the union label and makes it a further condition that the company enter into and remain bound by collective agreements with the relevant local union, in this case Local Union 46, with respect to building trades journeymen and apprentices and to the metal trades classifications. The collective agreement with respect to building trades journeymen and apprentices must provide for payment of construction wage rates, working hours and fringe benefits to the building trades journeymen and apprentices. Thus the Union Label Agreement appears to go beyond the Pipe Fabrication Shop Agreement in that it does not simply contemplate a "pick-up" arrangement, rather it sets as a condition precedent to a license for the company to use the union label, the requirement that the employer has signed a local collective agreement as aforesaid. It is difficult, therefore, to understand O'Ryan's evidence that, when a fabricator has signed the international agreements, the local union having geographic jurisdiction in the area where the shop is located does not negotiate a local collective agreement with the fabricator covering the building trades journeyman and apprentices who work in the shop.

17. In these circumstances and for the foregoing reasons the Board finds that the Pipe Fabrication Shop Agreement is not a collective agreement within the meaning of section 1(1)(e) of the Act. Whatever else it might be, however, the Board is satisfied that it is at least an

agreement that the company employ building trades journeymen and apprentices to perform the work directly connected with the fabrication of pipe bends, welded pipe assemblies or pipe formations as described in Article VIII and elsewhere in the Pipe Fabrication Shop Agreement and pay them the wage scales, working hours and fringe benefit payments established by a collective agreement or collective agreements to which Local Union 46 is a party or by which it is bound.

18. That requirement could include paying the wage scales, working hours and fringe benefit payments of the Agreement referred to in paragraph 3. If it does, and the Board makes no finding either way, the payment of those wages, working hours and fringe benefits is with respect to shop fabrication. This is a referral of a grievance in the construction industry purportedly dealing with work in the construction industry. Therefore, even were the Board to conclude that the Pipe Fabrication Shop Agreement bound the company to the Agreement, it would only be binding with respect to employees covered by the Pipe Fabrication Shop Agreement. While the Board is satisfied that that document, whatever it is, covers the company's shop employees, in order for the Board to conclude that it covered the company's employees who might install the shop's products on construction sites, it would have to be satisfied that the reference in Article IV – Recognition to "...employees of the employer..." includes such employees. That article, also refers specifically to building trades journeymen and apprentices and metal trades employees classifications. Those two groups of employees are referred to in several other articles of the document, but nowhere is there any reference to any other groups of employees. If the parties to the document intended that it cover employees engaged in on-site installation, whether it be the same building trades journeymen and apprentices who do the shop fabrication, it would have been simple enough for the parties to have made specific reference somewhere in the document to that work. In these circumstances and absent specific reference to employees engaged in on-site installation of pipe assemblies, the Board is not prepared to find that the Pipe Fabrication Shop Agreement binds the company to the Agreement with respect to its employees who may be engaged in the construction site installation of the fabricated pipe products of the shop.

19. Counsel for the applicant, in answer to a query from the Board, argued that Article IV of the Pipe Fabrication Shop Agreement is a voluntary recognition by the respondent that the United Association is the exclusive bargaining agent for the company's employees. If it is, by its very wording it is limited to the employees "...in the employ of the Employer in the Employer's fabricating shop or shops" and, therefore, would not extend to the company's employees in the construction industry.

20. In summary, the Board finds that the National Minimum Standard Agreement for a Commercial Pipe Fabrication Shop Agreement, whether read alone or together with the Agreement for Use of United Association Union Label, is not a collective agreement or any form of agreement including a voluntary recognition agreement binding the respondent to the provincial agreement between the Ontario Pipe Trades Council and the Mechanical Contractors Association of Ontario. In the result, the Board is without jurisdiction to process the grievance herein referred.

21. The application is dismissed.

0827-83-R Lynne Cuff on behalf of Fairvern Staff, Applicant, v. Service Employees International Union, Local 478, Respondent, v. **Vernon Nursing Home Services Limited**, Intervener

Practice and Procedure – Voluntary Recognition – Application filed within year of recognition – Employer nor Union presenting evidence to show union's entitle to represent at time agreement entered into – Whether declaration under section 60 prospective only – Agreement not constituting collective agreement – Not extended by *Inflation Restraint Act*

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members J. Wilson and W. F. Ruth-erford.

APPEARANCES: *Lynne I. Cuff for the applicant; no one appearing for the respondent; B. H. Stewart, Q.C., John Razulis and Michael Ford for the intervener.*

DECISION OF THE BOARD; September 23, 1983

1. This is an application brought pursuant to section 60 of the *Labour Relations Act*. The applicant, Ms. Cuff, is an employee in the bargaining unit in question. The respondent trade union was not certified as the bargaining agent of the employees of the intervener employer. On or about July 8, 1982, the trade union and the employer entered into an agreement purporting to be a collective agreement for the term September 1, 1982 to August 31, 1984. The agreement defines the bargaining unit as follows:

“all employees of Vernon Nursing Home Services Ltd., Huntsville, Ontario save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor and office staff.”

• • • •

3. Section 60 of the Act reads as follows:

60.-(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.

4. The respondent trade union was duly notified of the proceeding but did not appear at the hearing. The employer, being the other party to the alleged collective agreement, informed the Board that it would take no stand concerning the trade union's entitlement to represent the employees at the time that the agreement was entered into. The application was brought within the first year of the agreement between the trade union and the employer and is therefore timely.

5. Considering the status of the applicant, the timeliness of the application, the fact that the trade union was not certified to represent the employees in the bargaining unit, and that neither of the parties upon whom the onus to prove that the trade union was entitled to represent the employees presented any evidence or took any position on the trade union's entitlement, the Board hereby declares, pursuant to section 60(1), that the union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

6. Section 60(4) provides both that the trade union ceases to represent the employees in the bargaining unit and that any collective agreement ceases to operate forthwith once the Board issues the declaration contemplated by section 60(1). The problem confronting the Board is that raised by the employer concerning the effect of the *Inflation Restraint Act, 1982*, S.O. 1982, c. 55 (hereinafter referred to as the *Inflation Restraint Act*) on either the Board's jurisdiction or its remedial powers in this situation.

7. The employer's submissions concern the effect of the following sections of the *Inflation Restraint Act* on the *Labour Relations Act*:

4. In this Part,

• • • •

(c) "collective agreement" means a collective agreement as defined in the *Labour Relations Act*,...and any agreement between a unit of employees established for collective bargaining and an em-

ployer or person in the position of an employer for defininig, determining or providing for working conditions or terms of compensation;

• • • •

6.-(1) This Part applies to the compensation plans of employees employed in or by,

• • • •

- (i) any authority, board, commission, corporation, office, person or organization of persons, or any class of authorities, boards, commissions, corporations, offices, persons or organizations of persons, set out in the Schedule hereto or added to the Schedule by the regulations.

[Note: The Schedule contains the heading "Ministry of Health" and paragraph 1(b) under that heading refers to nursing homes licenced under the *Nursing Homes Act*.]

• • • •

8.-(1) Notwithstanding any other Act, except the *Human Rights Code, 1981*, and section 33 of the *Employment Standards Act*, every compensation plan that is in effect on the 21st day of September, 1982, shall be continued without change to and including its scheduled expiry date.

• • • •

11. Every compensation plan that is in effect on the 21st day of September, 1982, to which this part applies and that expires on or after the 1st day of October, 1982, including every compensation plan extended under section 9, shall;

• • • •

- (b) where the expiry date is scheduled to occur on or after the 1st day of October, 1983, be subject to this Part for the twelve-month period commencing with the plan's anniversary date falling within the period beginning with the 2nd day of October, 1982 and ending with the 1st day of October, 1983.

• • • •

13. Notwithstanding any other Act except the *Human Rights Code, 1981* and section 33 of the *Employment Standards Act*, but subject to section 14, the terms and conditions of,

(a) every compensation plan that is extended or made subject to this Part under section 9 or 11; and

(b) every collective agreement that includes such a compensation plan,

shall, subject to this Part, continue in force without change for the period for which the compensation plan is extended or made subject to this Part.

8. Briefly stated, the problem which the employer has raised flows from the fact that its employees are employed in a nursing home licensed under the *Nursing Homes Act* and are thereby covered by the provisions of the *Inflation Restraint Act*. The employer submits that the effect of a declaration under section 60 of the *Labour Relations Act* is prospective in its operation and does not make a collective agreement *void ab initio*. It further submits that there was a collective agreement in effect on September 21, 1982 and therefore the compensation plan is caught by section 8(1) of the *Inflation Restraint Act*. Section 13 of the *Inflation Restraint Act* ties the compensation plan to the collective agreement and continues the collective agreement in effect notwithstanding the *Labour Relations Act*. The employer said that it could not see why the reasoning in *Broadway Manor Nursing Home*, [1983] OLRB Rep. Jan. 26 would not apply in this case, and that the Board might be in the position of being able to declare that the trade union did not represent the employees but be unable to declare that the collective agreement ceased to exist. This would put the employer in the position of being bound to a grievance procedure administered by an agent who did not represent the employees, of being bound to remit dues to a trade union which did not represent the employees, etc.

9. The problem raised by the employer is another example of the potential impact of the *Inflation Restraint Act* on labour relations. However, in our view there can be no doubt that the Board would normally make the declaration requested by the applicant so that the employees could choose the bargaining agent, if any, whom they wished to represent them. The employer's submission that the *Inflation Restraint Act* creates a problem in this case rests on two assumptions: firstly, that a declaration under section 60(1) can only operate prospectively and secondly that the document or agreement signed on July 8, 1982 was a collective agreement within the meaning of the *Labour Relations Act*.

10. The Board does not have to deal with the first assumption in this case in light of our conclusion, but would note that the Board has allowed applications under section 60, or its predecessors, to be raised in otherwise untimely certification applications, and in issuing declarations under section 60(1), has found that the purported collective agreement relied on by the employer or incumbent union in those proceedings did not bar the application for certification, notwithstanding that the certification application was filed before the Board issued the declaration.

11. In *Algoma Maintenance Ltd.*, [1971] OLRB Rep. Dec. 815 the collective agreement between the employer and intervening union raised as a bar to the certification application was dated and effective on May 1, 1971, and had a two-year term. That agreement had been made subsequent to a voluntary recognition agreement signed on March 16, 1971. The application for certification was filed on October 6, 1971. The Board found that parties to the agreement had not established that the intervener union was entitled to represent the employees at the

time the agreement was entered into and thus stated in its decision of December 28, 1971, at paragraph 12, page 817:

“The Board accordingly declares that the intervener was not, at the time the alleged collective agreement was entered into, entitled to represent the employees in the bargaining unit. The alleged collective agreement between the respondent and the intervener is therefore not a bar to this application for certification.”

(See also *Dineen Roads and Bridges Ltd.*, unreported, Board File No. 5104-73-R, March 15, 1974, referred to in *Dineen Roads and Bridges Ltd.*, [1974] OLRB Rep. Aug. 516.

12. While one could view the *Algoma Maintenance* and *Dineen Roads* decisions as applying a declaration under section 60 other than prospectively, contrary to section 60(4), it is our opinion that the Board was actually determining whether there was a collective agreement, as defined in the Act, in existence at the time the applications for certification were filed.

13. In *Operative Plasterers and Cement Masons Association, Local 124*, [1978] OLRB Rep. April 362, an application under section 52 [now section 60] was filed seeking a declaration that the incumbent union was not entitled to represent the employees in the bargaining unit. The Board in that case found that the parties to the collective agreement had failed to discharge the onus under section 52(3) [now 60(3)] and made the requisite declaration. The Board in that case also found that “the alleged collective agreement ... which was executed on August 23, 1976 never was a collective agreement ...”

14. There was no evidence before the Board in this case that the union was entitled to represent any employees in the bargaining unit at the time the alleged collective agreement was entered into. Section 1(1)(e) of the Act defines collective agreement as “... an agreement in writing between an employer ... on the one hand and a trade union that ... *represents employees* of the employer... on the other hand respecting terms and conditions of employment...” [emphasis added]. There was nothing before the Board to indicate that the union represented *any* of the employees in the bargaining unit at *any* time. Therefore, we find that the union did not represent the employees of the employer at the relevant time and hence the agreement between the employer and the union was not a collective agreement, as defined by the *Labour Relations Act*, but was, at most, a voluntary recognition agreement. Having regard to our declaration in paragraph 5 we note that, pursuant to section 60(4), the union forthwith ceases to represent the employees in the bargaining unit.

CASE LISTINGS AUGUST 1983

	Page
1. Applications for Certification	
(a) Bargaining Agents Certified	177
(b) Applications Dismissed	183
(c) Applications Withdrawn	184
2. Applications for Declaration of Related Employer	185
3. Sale of a Business	185
4. Union Successor Rights	185
5. Applications for Declaration Terminating Bargaining Rights	186
6 Applications for Declaration of Unlawful Strike	188
7. Complaints of Unfair Labour Practice	188
8. Applications for Consent to Prosecute	191
9. Applications for Consent to Early Termination of Collective Agreement	191
10. Jurisdictional Disputes	192
11. Applications for Determination of Employee Status	192
12. Complaints under the Occupational Health and Safety Act	192
13. Construction Industry Grievances	192
14. Applications for Reconsideration of Board's Decision	196

APPLICATIONS DISPOSED BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1983

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0278-83-R: Ontario Public Service Employees Union, (Applicant) v. District Municipality of Muskoka, (Respondent).

Unit #1: "all employees of the respondent at its home for the aged (The Pines) in Bracebridge, save and except professional medical staff, Registered Nurses, Graduate Nurses, office and clerical staff, Administrative Coordinator, Supervisor, persons above the rank of Administrative Coordinator and Supervisor, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (37 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent at its home for the aged (The Pines) in Bracebridge employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, Registered Nurses, Graduate Nurses, office and clerical staff, Administrative Coordinator, Supervisor and persons above the rank of Administrative Coordinator and Supervisor". (28 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #3: "all office and clerical staff of the respondent at its home for the aged (The Pines) in Bracebridge, save and except Administrative Coordinator, and those above the rank of administrative Coordinator." (18 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0459-83-R: United Steelworkers of America, (Applicant) v. Northern Plastics Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Lincoln, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (26 employees in unit). (*Having regard to the agreement of the parties*).

0651-83-R: Retail, Wholesale and Department Store Union, AFL.CIO.CLC., (Applicant) v. Rudolph's Specialty Bakeries Ltd., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by the subsisting Board certificate dated July 18, 1980." (97 employees in unit). (*Having regard to the agreement of the parties*).

0656-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Bramalea Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent engaged in cleaning and maintenance, including resident superintendents, at 10 Kensington Road, 15 Eastbourne Drive, 37 Eastbourne Drive, 9 Lisa Road, 10 Lisa Road, 11 Lisa Road, 790 Clark Boulevard, 3 Knightsbridge Road, 11 Knightsbridge Road, 2 Silver Maple Court, 4 Silver Maple Court, 67 Silver Maple Court, 8 Silver Maple Court, 5 Kings Cross Road and 15 Balmoral Drive in the City of Brampton, save and except property manager and persons

above the rank of property manager, and students employed during the school vacation period." (51 employees in unit). (*Having regard to the agreement of the parties*).

0689-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Applicant) v. W. L. Webster Mfg. Limited, (Respondent).

Unit: "all employees of the respondent in the City of Windsor save and except foreman, persons above the rank of foreman, and office and sales staff." (18 employees in unit).

0701-83-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351, (Applicant) v. Four Seasons Hotel Toronto (Four Seasons Yorkville), (Respondent), v. Group of Employees, (Objectors).

Unit: "all front desk employees of the respondent at 21 Avenue Road in the City of Toronto, except assistant front desk manager and persons above the rank of assistant front desk manager, office clerical and sales staff, reservation clerks, concierge, audit department staff, security staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons covered by a subsisting collective agreement." (17 employees in unit). (*Having regard to the agreement of the parties*).

0714-83-R: The Ontario Provincial Conference of Bricklayers & Allied Craftsmen, (Applicant) v. The Brant County Board of Education, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

Unit #1: "all bricklayers and bricklayers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all bricklayers and bricklayers' apprentices in the employ of the respondent in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0825-83-R: Labourers' International Union of North America, Ontario Provincial District Council, Local 1059, (Applicant) v. Astro Concrete & Servicing London, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0833-83-R; United Brotherhood of Carpenters and Joiners of America, (Applicant) v. St. Clair Drywall Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #3: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0837-83-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. Les Toitures Raymond Inc., (Respondent).

Unit #1: "all sheet metal workers and sheet metal workers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all sheet metal workers and sheet metal workers' apprentices of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0856-83-R: The United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. New Style Drywall Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

0871-83-R: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Applicant) v. National Press Club of Canada Inc., (Respondent).

Unit: "all employees of the respondent in the City of Ottawa, Ontario, save and except manager, persons above the rank of manager and office staff." (16 employees in unit). (*Having regard to the agreement of the parties*).

0872-83-R: The International Association of Bridge, Structural & Ornamental Ironworkers, Local 736, (Applicant), v. Kushog Welding & Installation Co. Limited, (Respondent).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit)

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

0873-83-R: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Evangelical Baptist Church, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and

except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit). (*Having regard to the agreement of the parties*).

0874-83-R: Labourers International Union of North America, Local Union 493, (Applicant) v. G. M. Gest Inc., (Respondent).

Unit: "all construction labourers in the employ of the respondent within a radius of 57 kilometers (approximately 20 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in unit).

0888-83-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Artek Door Industries Ltd., (Respondent).

Unit: "all employees of the respondent in Oakville, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff." (14 employees in unit). (*Having regard to the agreement of the parties*).

0906-83-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Vanfax Corporation, LOF of Canada Ltd., (Respondent).

Unit: "all employees of the respondent at its warehouse in the Municipality of Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, dispatcher, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (24 employees in unit). (*Having regard to the agreement of the parties*).

0917-83-R: United Food and Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. Belle River Canning Ltd., (Respondent).

Unit: "all employees of the respondent at Belle River, Ontario, save and except forepersons, those above the rank of foreperson, office and sales staff and seasonal employees." (14 employees in unit). (*Having regard to the agreement of the parties*).

0919-83-R: Service Employees' Union, Local 210, Affiliated with Service Employees' International Union, AFL:CIO:CLC; (Applicant) v. Dor Bar Ltd. c.o.b. as Borics Family Haircare Centre, (Respondent).

Unit: "all employees of the respondent at Windsor, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff." (25 employees in unit). (*Having regard to the agreement of the parties*).

0933-83-R: Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (32 employees in unit). (*Having regard to the agreement of the parties*).

0934-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Vex Concrete Inc., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (15 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (15 employees in unit).

0939-83-R: Canadian Telephone Employee’s Association, (Applicant) v. Bell Canada Enterprises Inc., (Respondent).

Unit: “all office and clerical employees of the respondent in Metropolitan Toronto save and except supervisors, and persons above the rank of supervisor.” (20 employees in unit). (*Having regard to the agreement of the parties*).

0944-83-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Bluebell Underground Inc., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

0958-83-R: United Brotherhood of Carpenters & Joiners of America Local Union 93, (Applicant) v. Rolland Duquette Construction, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

0965-83-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. National Grocers Co. Ltd., (Respondent).

Unit: “all office and clerical employees of the respondent at London, Ontario save and except branch controller, persons above the rank of branch controller, merchandising manager, produce manager, buyer sales staff, students employed during the school vacation period and employees covered by subsisting collective agreements.” (8 employees in unit). (*Having regard to the agreement of the parties*).

0979-83-R: Canadian Union of Public Employees, (Applicant) v. Humane Society of Ottawa-Carleton, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent save and except assistant managing director, persons above the rank of assistant managing director, secretary to the managing director, persons regularly employed

for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (15 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Applications for Certification Dismissed – No Vote Conducted*).

0981-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Dwight Crane Rentals, (Respondent).

Unit #1: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

Unit #2: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

0995-83-R: Health, Office & Professional Employees, Division of Local 206, (Applicant) v. Quinte Beach Nursing Home, (Respondent).

Unit: “all employees of the respondent in the United Counties of Lennox and Addington save and except supervisors, persons above the rank of supervisor, office and clerical staff and Registered and Graduate Nurses.” (51 employees in unit). (*Having regard to the agreement of the parties*).

1004-83-R: Teamsters Chemical, Energy and Allied Workers Local 424, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant) v. Witco Chemical Canada Limited, (Respondent).

Unit: “all employees of the respondent in Oakville, Ontario save and except foremen, those above the rank of foreman, office, clerical and technical staff, sales staff, and those persons covered by a subsisting collective agreement”. (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1013-83-R: International Brotherhood of Painters and Allied Trades – Local Union 557, (Applicant) v. Division Construction Ltd., (Respondent).

Unit #1: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

1038-83-R: Construction Workers Local No. 6 (affiliated with the Christian Labour Association), (Applicant) v. Far North Construction Company Ltd., (Respondent).

Unit: “all construction labourers, carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the

Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

1046-83-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Cory Canada Inc. (c.o.b. as Cory Coffee Services), (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (12 employees in unit). (*Having regard to the agreement of the parties*).

1057-83-R: The Canadian Union of Public Employees, (Applicant) v. Corporation of the United Counties of Prescott and Russell, (Respondent).

Unit: “all clerical, office and technical employees of the respondent in the United Counties of Prescott and Russell, Ontario, save and except Chief Administrative Officer, Deputy Clerk Treasurer, Secretary to Chief Administrative Officer, Deputy Secretary of Land Division Department, Social Services Administrator, Assistant to Social Services Administrator, Office Manager of Social Services Department, Economic Development Officer, employees of the Roads Department, employees of the Prescott and Russell residence and manager of the Prescott and Russell workshop.” (22 employees in unit). (*Having regard to the agreement of the parties*).

Bargaining Agents Certified Subsequent to a Post Hearing Vote

0442-83-R: Service Employees Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Extendicare Limited, (Respondent).

Unit: “all employees of the respondent’s nursing home in the Borough of Scarborough regularly employed for not more than twenty-two and a half hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and persons covered by subsisting collective agreements.” (52 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’list		50
Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant		31*
Number of ballots marked against applicant		1
Ballots segregated and not counted		1

Applications for Certification Dismissed – No Vote Conducted

0736-83-R: International Union of Bricklayers and Allied craftsmen – Local #1 Ontario, (Applicant) v. Hamilton East Kiwanis Non Profit Homes Inc., (Respondent).

0832-83-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. The Regional Municipality of Halton, (Respondent) v. Group of Employees, (Objectors). (21 employees in unit).

0964-83-R: The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters’ and Joiners of America, (Applicant) v. William Terlouw, (Respondent). (9 employees in unit).

0979-83-R: Canadian Union of Public Employees, (Applicant) v. Humane Society of Ottawa-Carleton, (Respondent) v. Group of Employees, (Objectors).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant managing director, and secretary to the managing director." (2 employees in unit). (*Having regard to the agreement of the parties*).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0571-83-R: United Paperworkers International Union, (Applicant) v. James River Marathon Limited (formerly American Can Canada Inc.), (Respondent).

0763-83-R: Union of Labour Representatives of Ontario, (Applicant) v. Mooney's Bay T.V. and Stereo Ltd., (Respondent) v. Group of Employees, (Objectors).

0822-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Frederick Transport Limited, (Respondent) v. Canadian Transportation Workers, Union, Local 188, (Intervener).

0838-83-R; 0847-83-R: London and District Service Workers' Union and Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Meadowcroft Place, (Respondent).

0899-83-R: Sunnybrook Hospital Employees Union, Local 777 S.E.I.U., (Applicant) v. Sunnybrook Hospital, (Respondent).

0900-83-R: Canadian Union of Public Employees, (Applicant) v. Canadian National Exhibition Association, (Respondent).

0932-83-R: Service Employees Union, Local 204, Affiliated with the A.F.L., C.I.O., C.L.C., (Applicant) v. Orillia Soldiers' Memorial Hospital, (Respondent).

0935-83-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. Riverside Hospital of Ottawa, (Respondent).

0937-83-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Stacey Bros. Ltd., (Respondent).

0957-83-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. West-Home Industries Ltd., (Respondent).

0986-83-R: Public Service Alliance of Canada, (Applicant) v. Ralston Construction, a Division of Maple Grove Building Specialties Limited, (Respondent).

1018-83-R: Lumber & Sawmill Workers' Union, Local 2995, of The United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bois A. Lachance Lumber Ltd., (Respondent).

1037-83-R; 1054-83-R: International Union of Operating Engineers, (Applicant) v. Dawn Enterprises, (Respondent).

1069-83-R: United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. Grenville Christian College, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0178-83-R International Union, United Automobile Aerospace Agricultural Implement Workers and its Local 27, (Applicant) v. Central Chev. Olds. Inc., Extend-A-Life Car Care Centre, Pat-Har Holdings Ltd., and 533556 Ontario Inc., carrying on business as the Complete Car Care Centre, (Respondents). (*Dismissed*).

0956-83-R: United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. City Acoustics Chemstend Acoustics, (Respondent). (*Withdrawn*).

1064-83-R: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Kamco Acoustic Supply, K. A. Mace Limited and Paul K. Mace Interior Supply, (Respondent). (*Granted*).

SALE OF A BUSINESS

1594-82-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Contra Construction Limited, Trent Masonry Ltd. and Arthur Berghout, carrying on business under the name and style of Arend Construction (Respondents). (*Granted*).

0179-83-R: International Union, United Automobile Aerospace and Agricultural Implement Workers of America and its Local 27, (Applicant) v. Central Chev. Olds. Inc., and 533556 Ontario Inc. carrying on business as the Complete Car Care Centre, (Respondents) v. Pat-Har Holdings Ltd., (Intervener). (*Dismissed*).

UNION SUCCESSOR RIGHTS

0653-83-R: Office & Professional Employees International Union, (Applicant) v. Association of Commercial & Technical Employees Local 1703, (Respondent). (*Granted*).

0748-83-R: Graphic Communications International Union, Local 211, Toronto, (Applicant) v. Colourgraph Reproduction Systems Inc., (Respondent). (*Granted*).

0749-83-R: Graphic Communications International Union, Local 542, Hamilton, (Applicant) v. Richer Graphics Limited, (Respondent). (*Granted*).

0750-83-R: Graphic Communications International Union, Local 588, Ottawa, (Applicant) v. British American Bank Note Inc., (Respondent). (*Granted*).

0751-83-R: Graphic Communications International Union, Local 517, London, (Applicant) v. Matheson Art Reproductions, (Respondent). (*Granted*).

0752-83-R: Graphic Communications International Union, Local 28-B, Toronto, (Applicant) v. Thistle Printing, (Respondent). (*Granted*).

0753-83-R: Graphic Communications International Union, Local 194-B, Oshawa, (Applicant) v. The Alger Press Limited, (Respondent). (*Granted*).

APPLICATION FOR DECLARATION TERMINATING BARGAINING RIGHTS

0150-83-R: Susan Parker, (Applicant) v. Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders' International Union, (Respondent) v. Imperial Tavern, (Intervener).

Unit: "all full-time and part-time male and female employees employed in the beverage department in (Imperial Tavern) as tapmen, bartenders, beverage waiters, (including waiters who operate automatic dispensing equipment), bar boys and improvers and any other new classification relating to the serving of alcoholic beverages". (7 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		5
Ballots segregated and not counted		1

0348-83-R: Madge Chambers, (Applicant) v. United Food and Commercial Workers Local Union 725, (Respondent).

Unit: "all employees of Title Stores Limited in Napanee, Ontario, save and except the pharmacist, store manager, persons above the rank of store manager, persons employed for not more than 24 hours per week and students employed in off-school hours and during the school vacation period." (8 employees in unit). (*Dismissed*).

0447-83-R: Fred Nixon, (Applicant) v. Canadian Union of Operating Engineers and General Workers Local 100, (Respondent) v. Kelsey-Hayes Canada Ltd. - Windsor Division, (Intervener).

Unit: "all stationary engineers and helpers employed by the intervener in its Power Plant and Waste Treatment Plant at Windsor, Ontario, save and except Chief Engineer." (8 employees in unit). (*Granted*).

Number of names of persons on list originally prepared		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent		1
Number of ballots marked against respondent		7

0550-83-R: Lesia Murphy, (Applicant) v. Retail, Commercial & Industrial Union, Local 206 Chartered by the United Food & Commercial Workers International Union, (Respondent) v. Fabricland Distributors (Western) Co., (Intervener).

Unit #1: "all employees in Kitchener, save and except store manager, persons above the rank of store manager, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period". (2 employees in unit). (*Granted*).

Number of persons on list as originally prepared		1
Number of persons who cast ballots	1	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		1

Unit #2: "all employees in Kitchener regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except store manager and persons above the rank of store manager". (6 employees in unit). (*Granted*).

Number of persons on list originally prepared		6
Number of persons who cast ballots	4	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		4

0570-83-R: Shelley Pierce, (Applicant) v. United Food and Commercial Workers, Local Union 725, (Respondent). (14 Employees in unit). (*Withdrawn*).

0599-83-R: Vince Merrifield, (Applicant) v. Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. Jen-Sar Warehousing Inc. (Intervener).

Unit: "all employees of Jen-Sar Warehousing Inc. working at Sault Ste. Marie, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, those persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (6 employees in unit). (*Granted*).

Number of persons on list as originally prepared		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		5

0704-83-R: Jacqueline Theriault, (Applicant) v. United Food and Commercial Workers, Local Union 725, (Respondent). (14 employees in unit). (*Withdrawn*).

0769-83-R: Sherlene Bellefleur, Janet Bristow, Karen Suzor & Juliet Belanger, (Applicants) v. Hotel Employees & Restaurant Employees Union, Local 75, (Respondent) v. Total Food Systems Limited, (Intervener).

Unit: "all employees of the intervener employed at Sneaky Pete's Devonshire Mall, Windsor, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (4 employees in unit). (*Terminated*).

0770-83-R: Trula White, (Applicant) v. United Steelworkers of America, (Respondent) v. Mirlon Plastics Manufacturing Limited, (Intervener).

Unit: "all employees of Mirlon Plastics Manufacturing Limited in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff". (24 employees in unit). (*Granted*).

0785-83-R: William Stewart (on behalf of a group of protesting employees of K-Mart Distribution Centre), (Applicant) v. Teamsters, Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent) v. K Mart Canada Limited, (Intervener). (44 employees in unit). (*Dismissed*).

0798-83-R: Nancy Hamilton, Jelica Korolija, Shalima Mohammed, Julia Mainse, Cecil W. Sproule & Cheri Hopkinson, (Applicants) v. Commercial Workers Union Local 486, (Respondent).

Unit: "all employees of Fabricland Distributors at Kingston, Ontario, save and except store manager, persons above the rank of store manager and persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods." (8 employees in unit). (*Granted*).

0855-83-R: Larry R. Kennedy, (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) and its Local 397, (Respondent).

(25 employees in unit). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0807-83-U: The Mill Dining Lounge, (Applicant) v. Hotels, Clubs, Restaurants and Taverns Employee Union, Local 261, F. Grilla, Secretary Treasurer and Business Agent, Eleanor S. Dunn, A. Charron, A. Charron, John Simpson, Lawrence Carter, Rad Daher, Claude Borda, Fernando Cagial, Stan Elliott, Carlo Vial, Pierre Hardy, Kathleen Kennedy, Tom Hughes, Roberto Rei, Oscar Borda, (Respondents). (*Dismissed*).

1093-83-U: Canadian Totalisator Company, Division of General Instrument of Canada Limited, (Applicant) v. International Brotherhood of Electrical Workers, Local Union No. 1501 and Patrick J. Molloy, (Respondents). (*Dismissed*).

1097-83-U: Canadian Totalisator Company, Division of General Instrument of Canada Limited, (Applicant) v. William Evans, Ian Konderak, Dave Pane, George Robertson, Jerry F. DeBartolo and Eric Rydzkowski, (Respondents). (*Dismissed*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1095-81-U: Frank Manoni, (Complainant) v. Labourers' International Union of North America, Local 527, Nello Scipioni, and Bernardino Carrozzi, (Respondents). (*Dismissed*).

1578-82-U; 1579-82-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied kEmployees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Sundance Cookies Ltd., (Respondent). (*Withdrawn*).

1897-82-U; 2227-82-U: Canadian Paperworkers Union, CLC and Its Local 305, (Complainant) v. International Wallcoverings, A Division of International Paints (Canada) Limited, (Respondent). (*Withdrawn*).

2343-82-U: Bruce Hamilton McWhinney, (Complainant) v. Cana Industrial Contractors Ltd. and Millwright District Council of Ontario, (Respondents). (*Dismissed*).

2492-82-U: Canadian Union of Operating Engineers and General Workers, (Complainant) v. Blue Line Taxi Company Limited, (Respondent). (*Dismissed*).

2654-82-U: United Steelworkers of America, (Complainant) v. Fireco Inc. (Respondent). (*Withdrawn*).

2670-82-U: Communications Workers of Canada, (Complainant) v. C. T. G. Telecommunications Systems, Inc., c.o.b. as Canadian Telecommunications Group, (Respondent). (*Dismissed*).

2671-82-U: Canadian Paperworkers Union, CLC and Its Local 305, (Complainant) v. International Wallcoverings, A Division of International Paints (Canada) Limited, (Respondent). (*Granted*).

0093-83-U: London and District Service Workers Union, Local 220. S.E.I.U., A.F.L., C.I.O., C.L.C., (Complainant) v. St. Raphael's Nursing Home, (Respondent). (*Granted*).

0198-83-R: United Food and Commercial Workers' International Union, Local 175, (Complainant) v. Canadian Pizza Co. Ltd., (Respondent). (*Withdrawn*).

0255-83-U: Chris Pantelidis, (Complainant) v. Canadian Union of Operating Engineers & General Workers Local 101, (Respondent) v. Midmetro Plastics Limited, (Intervener). (*Dismissed*).

0384-83-U: Amalgamated Clothing and Textile Workers Union and its Local 1591, (Complainant) v. The Stewart Group Ltd./Engineered Yarns of Canada Ltd., (Respondent). (*Granted*).

0456-83-U: Melvin Coombs, (Complainant) v. Compressed Metals Employee's Association, (Respondent) v. Compressed Metals Co., Division of Intermetco Limited, (Intervener). (*Dismissed*).

0538-83-U: Ontario Nurses' Association, (Complainant) v. Weight Loss Inc., (Respondent). (*Withdrawn*).

0544-83-U: Ronald Gordon Norris, (Complainant) v. Printing Specialties and Paper Products Union Local 540, (Respondent). (*Withdrawn*).

0576-83-U: Retail Clerks Union, Local 409, (Complainant) v. Dryden Truck Stop Inc. (formerly Farlane Properties Ltd.), (Respondent). (*Granted*).

0591-83-U: Alfred Sardone, (Complainant) v. Local 5958, United Steelworkers, (Respondent) v. Russelsteel, Division of York Russel Inc., (Intervener). (*Dismissed*).

0616-83-R: Local 354, United Textile Workers of America, (Complainant) v. Silknit Limited, (Respondent). (*Granted*).

0644-83-U: Health, Office & Professional Employees division of Retail, Commercial & Industrial Union, Local 206, chartered by the United Food & Commercial Workers International Union, (Complainant) v. Sweetbriar Lodge Nursing Home, (Respondent). (*Withdrawn*).

0683-83-U: Labourers' International Union of North America, Local 1036, (Complainant) v. H.J. Voth & Sons Ltd., and Henry Voth, (Respondents). (*Withdrawn*).

0719-83-U: International Ladies Garment Workers' Union, (Complainant) v. Moda Corp. (Respondent). (*Withdrawn*).

0720-83-U: Labourers' International Union of North America, Local 183, (Complainant) v. Eastwood Food Services Limited, (Respondent). (*Withdrawn*).

0721-83-U: Health, Office & Professional Employees, Division of Local 206, Retail, Commercial & Industrial Union, chartered by the United Food and Commercial Workers International Union, (Complainant) v. Sweetbriar Lodge Nursing Home, (Respondent). (*Withdrawn*).

0738-83-U: Ronald Rodgers, (Complainant) v. Canadian General-Tower Limited, Etobicoke Plant and United Steelworkers of America on behalf of Local 13286, (Respondents) v. J. B. Patterson, (Intervener). (*Withdrawn*).

0759-83-U: John T. Davidson, (Complainant) v. Gerald Frost, (Respondent). (*Withdrawn*).

0761-83-U: Michel Cyr, (Complainant) v. Mine Mill Union Local 598, (Respondent) v. Falconbridge Limited, (Intervener). (*Dismissed*).

0766-83-U: Joseph Anthony Rodrigues, (Complainant) v. Local 112 U.A.W., (Respondent) v. The deHavilland Aircraft of Canada, Limited, (Intervener). (*Withdrawn*).

0767-83-U: Stefania Friedman, (Complainant) v. S. Kruger of Canadian Union of Public Employees, (Respondent). (*Withdrawn*).

- 0772-83-U:** Service Employees' International Union, Local 204 (A.F.L., C.I.O., C.L.C.), (Complainant) v. Bestview Holdings and Bestview Services Limited, (Respondents). (*Withdrawn*).
- 0797-83-U:** Chia Chung, (Complainant) v. Canadian Union of Public Employees -C.L.C. Ontario Hydro Employees' Union Local 1000, (Respondent). (*Withdrawn*).
- 0802-83-U:** Edward R. (Ted) Holt, (Complainant) v. Travelways & CBRT & Union, (Respondent). (*Withdrawn*).
- 0803-83-U:** Barrington Morrison, (Complainant) v. Weldo Plastics Limited, and International Leather Goods, Plastics and Novelty Workers Union, Local No. 8, (Respondent). (*Withdrawn*).
- 0828-83-U:** Teamsters Local Union No. 419, (Complainant) v. Metro Toronto News Company, (Respondent). (*Withdrawn*).
- 0831-83-U:** Salvatore Marocco, (Complainant) v. Board of Directors of Labourer's Local 625, (Respondent). (*Withdrawn*).
- 0842-83-U:** Hotel Employees & Restaurant Employees Union, Local 75, (Complainant) v. Valhalla Inn Limited, (Respondent). (*Withdrawn*).
- 0846-83-U:** Service Employees' International Union, Local 183, (Complainant) v. Rickarton Castle Hotel, Inc., (Respondent). (*Withdrawn*).
- 0854-83-U:** Carleton Roman Catholic Separate School Board Employees' Association, (Complainant) v. Carleton Roman Catholic Separate School Board, (Respondent). (*Withdrawn*).
- 0857-83-U; 0858-83-U; 0859-83-U; 0860-83-U:** Union Labour Representatives of Ontario, (Complainant) v. Mooney's Bay T.V. and Stereo Ltd. (Respondent). (*Withdrawn*).
- 0861-83-U:** Canadian Union of Operating Engineers & General Workers, (Complainant) v. T.D.L. Woodtreating Ltd., (Respondent). (*Withdrawn*).
- 0867-83-U:** Labourer's International Union of North America, Local 1267, (Complainant) v. Peel Truck and Trailer Equipment Ltd., (Respondent). (*Withdrawn*).
- 0882-83-U:** Joseph Fenech, (Complainant) v. Brotherhood of Maintenance and Way Employees, (Respondent). (*Withdrawn*).
- 0885-83-U:** Luca Campo, (Complainant) v. International Labourers' Union Local 506, (Respondent). (*Withdrawn*).
- 0902-83-U:** Aluminum Brick & Glass Workers International Union, (Complainant) v. Unit Farm Concrete Products, (Respondent). (*Withdrawn*).
- 0908-83-U:** Canadian Union of Operating Engineers and General Workers, Local 101, (Complainant) v. T.D.L. Woodtreating Ltd., (Respondent). (*Withdrawn*).
- 0909-83-U:** Service Employees International Union, Local 532, (Complainant) v. The Homewood Sanitarium, (Respondent). (*Withdrawn*).
- 0910-83-U:** Enciu - Andy Vasilaki, (Complainant) v. Service Employees Union, Local 204, (Respondent). (*Withdrawn*).

0912-83-U: Wayne Richards, (Complainant) v. Lumber and Sawmill Workers Union, Local 2693, (Respondent). (*Withdrawn*).

0914-83-U: Adelina Crisostimo, Pino Crisostimo (for the above mentioned), (Complainant) v. ACTWU Amalgamated Clothing & Textile, Local 1865, (Respondent). (*Withdrawn*).

0921-83-U: John Thomas, (Complainant) v. Victoria Hospital Corporation, (Respondent). (*Withdrawn*).

0926-83-U: United Brotherhood of Carpenters and Joiners of America, (Complainant) v. F. LeBlond Cement Products Limited, (Respondent). (*Withdrawn*).

0928-83-U: Cedo Prug, (Complainant) v. The United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada – Local 67 – And, Jaddco Anderson Limited, (Respondents). (*Withdrawn*).

0930-83-U: Joseph Chimienti, (Complainant) v. UAW Local 444 Rep. Mickey Rankin, (Respondent). (*Withdrawn*).

0945-83-U: Fredrick Martin Sprenger, (Complainant) v. The Employees Association of Canon Inc., (Respondent). (*Withdrawn*).

0950-83-U: N. Kishore Bhalla, (Complainant) v. U.R.W. Local Union 1031, (Respondent). (*Withdrawn*).

0952-83-U: Service Employees' International Union, Local 204, (A.F.L., C.I.O., C.L.C.), (Complainant) v. Bestview Holdings Limited and Bestview Services Limited, (Respondents). (*Withdrawn*).

0974-83-U: Michael W. Ogden, (Complainant) v. Jim Pigott, (Respondent). (*Withdrawn*).

1011-83-U: Linda Evenden, (Complainant) v. Udo Drescher Manager of Wilberforce Veneer Co., (Respondent). (*Withdrawn*).

1092-83-U: Angelo Moro, (Complainant) v. Operative Plasterers and Cement Masons, Local 598, (Respondent). (*Dismissed*).

1118-83-U: Local 1, Utility Workers of Canada, (Complainant) v. Scarborough Public Utilities Commission, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

073-83-U: Helen Balogh, (Applicant) v. United Food and Commercial Workers Local Union 725 and Frank Kelly, (Respondents). (*Withdrawn*).

0808-83-U: The Mill Dining Lounge, (Applicant) v. Hotels, Clubs, Restaurants and Taverns Employee Union, Local 261, F. Grilla, Secretary Treasurer and Business Agent, Eleanor S. Dunn, A. Charron, John Simpson, Lawrence Carter, Rad Daher, Claude Borda, Fernando Cagial, Stan Elliott, Carlo Vial, Pierre Hardy, Kathleen Kenedy, Tom Hughes, Roberto Rei, Oscar Borda, (Respondents). (*Dismissed*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0940-83-M: Gibson's Cleaners Co. Limited, (Employer) v. Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351, (Trade Union). (*Granted*).

JURISDICTIONAL DISPUTES

1013-83-JD: Labourers' International Union of North America, Local 493, (Complainant) v. G. M. Gest Inc., United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800, William Weatherup and Michael Zangari, (Respondent). (*Granted*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2161-81-M: The Corporation of the City of Barrie, (Applicant) v. The Canadian Union of Public Employees, Local 2380, (Respondent). (*Dismissed*).

2499-82-M: St. Catharines Public Library, (Applicant) v. Canadian Union of Public Employees, Local 2220, (Respondent). (*Dismissed*).

0315-83-M: Canadian Union of Public Employees and its Local 1022, (Applicant) v. Village of Bancroft, (Respondent). (*Granted*).

0630-83-M: Ontario Public Service Employees Union, (Applicant) v. Dairy Herd Improvement Corporation, (Respondent). (*Withdrawn*).

0835-83-M: Ottawa General Hospital, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Withdrawn*).

0865-83-M: Canadian Union of Public Employees and its Local 2496, (Applicant) v. Collingwood Public Utilities Commission, (Respondent). (*Terminated*).

1017-83-M: Ontario Public Service Employees Union, (Applicant) v. Royal Ontario Museum, (Respondent). (*Dismissed*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0339-83-OH: Isaiah Argunen, (Complainant) v. Wheeler Metal Products Ltd., (Respondent). (*Dismissed*).

CONSTRUCTION INDUSTRY GRIEVANCES

1880-82-M: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. John Sourasis carrying on business as Johnson's Painting Company, 526132 Ontario Incorporated carrying on business as Kos Decorating, Johnson's Painting Company Limited, (Respondents). (*Withdrawn*).

2161-82-M: Christian Labour Association of Canada, (Applicant) v. Carroll Electric (1982) Limited, (Respondent) v. Derek Murr, (Employee). (*Granted*).

2203-82-M; 2204-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Oakdale Drywall and Skycon, (Respondent). (*Withdrawn*).

2423-82-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Clay Bradshaw Inc., (Respondent). (*Granted*).

2551-82-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. AGIP Structural Steel Limited, (Respondent). (*Granted*).

2640-82-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 800, (Applicant) v. Bennett and Wright Company Limited and Tesc Construcion Company Limited, (Respondents). (*Dismissed*).

2643-82-M: Drywall, Accoustic, Lathing and Instalation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Northyork Drywall & Acoustic Systems, (Respondent). (*Withdrawn*).

0235-83-M: United Brotherhood of Carpenters and Joiners of America, Local Union 2486, (Applicant) v. Pro-Eng Buildings Limited, (Respondent). (*Granted*).

0374-83-M; 0375-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 67, (Applicant) v. Imicon Construction Ltd., (Respondent). (*Granted*).

0429-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Richardson Mechanical & Millwrighting Inc., (Respondent). (*Granted*).

0439-83-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. K. A. Mace Ltd., (Respondent). (*Granted*).

0455-83-M: The International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of Bricklayers and Allied Craftsmen, (Applicant) v. The Terazzo Tile and Marble Guild of Ontario Inc., and Royal Tile and Terazzo, (Respondents). (*Withdrawn*).

0479-83-M: The Ontario Pipe Trades Council and The United Association Local Union 800, (Applicant) v. The Mechanical Contractors Association of Ontario and Bennett and Wright Company Limited, (Respondents). (*Dismissed*).

0660-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Sivi Construction Ltd., (Respondent). (*Withdrawn*).

0664-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Roma Excavating & Grading Ltd., (Respondent). (*Withdrawn*).

0687-83-M; 0688-83-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700, (Applicant) v. R. J. Cyr Co. Inc., (Respondent). (*Withdrawn*).

0723-83-M; 0724-83-M; 0725-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Majestic Contractors Limited, (Respondents). (*Withdrawn*).

0744-83-M: International Associaiton of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Standard Insulation Limited, (Respondent). (*Withdrawn*).

0757-83-M: Laoubres' International Union of North America, Local 183, (Applicant) v. Woodheights Construction, (Respondent). (*Granted*).

0843-83-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, (Applicant) v. Model Railings Ltd., (Respondent). (*Granted*).

0844-83-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. D-H Custom Woodworking, (Respondent). (*Granted*).

0863-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Lucy Construction Ltd. (Respondent). (*Withdrawn*).

0864-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Brentmuir Investments Limited, (Respondent). (*Withdrawn*).

0876-83-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Bennett-Pratt Limited, (Respondent). (*Withdrawn*).

0878-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Thornhill Excavating & Grading Ltd., (Respondent). (*Withdrawn*).

0879-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Ray Peterson Construction, (Respondent). (*Withdrawn*).

0880-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Tony Di-Monte Drainage Contracting Ltd., (Respondent). (*Withdrawn*).

0881-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. M. B. Paving Ltd., General Contractor, (Respondent). (*Withdrawn*).

0893-83-M: Resilient Floor Workers, Local Union 2965, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Eton Construction, (Respondent). (*Withdrawn*).

0894-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Golden Construction Co. (A Division of 506878 Ontario Limited), (Respondent). (*Withdrawn*).

0901-83-M: The Millwrights District Council of Ontario and Millwright and Machine Erectors Local 2309, (Applicant) v. Lummus Company of Canada Limited, (Respondent). (*Withdrawn*).

0913-83-M: Labourers' International Union of North America, Local 1081, (Applicant) v. D&K Construction Limited, (Respondent). (*Withdrawn*).

0922-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Coolmur Properties Limited, (Respondent). (*Withdrawn*).

0923-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Perfetti Brothers Construction Co. Ltd., (Respondent). (*Withdrawn*).

0924-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. New Rise Forming Ltd., (Respondent). (*Withdrawn*).

0925-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Savini Construction Co. Ltd., (Respondent). (*Withdrawn*).

0931-83-M: Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Beebe & Hookham Refrigeration Limited and Beebe & Company carrying on business under the name and style of Beebe & Hookham Refrigeration Limited, (Respondent). (*Withdrawn*).

0938-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Locklands Limited, carrying on business as Maco Construction, (Respondent). (*Granted*).

0947-83-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 666, (Applicant) v. Rudy's Metal Works Limited, (Respondent). (*Granted*).

0951-83-M: Labourers' International Union of North America, Local 1081, (Applicant) v. McKinlays of Cambridge Limited, (Respondent). (*Withdrawn*).

0955-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. City Acoustics, (Respondent). (*Withdrawn*).

0961-83-M; 0969-83-M: United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. James Kemp Construction Ltd., (Respondent). (*Withdrawn*).

0970-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Duntri Construction – A Partnership of Tripp Construction Limited and 500869 Ontario Inc., (Respondent). (*Withdrawn*).

0973-83-M: United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. John E. Smith Contracting Limited, (Respondent). (*Withdrawn*).

0978-83-M: International Union of Elevator Constructors Local 50, (Applicant) v. Dover Corporation (Canada) Limited, (Respondent). (*Withdrawn*).

0982-83-M: International Association of Bridge, Structural & Ornamental Ironworkers Union, Local 759, (Applicant) v. Varco Steel, (Respondent). (*Withdrawn*).

1001-83-M: Resilent Floor Workers, Local 2965, United Brotherhood of Carpenters' & Joiners of America, (Applicant) v. Aldershot Flooring Limited, (Respondent). (*Withdrawn*).

1003-83-M: Local Union 128 International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, (Applicant) v. SNC/FW Ltd., (Respondent). (*Withdrawn*).

1006-83-M: I.U.O.E. Local 793, (Applicant) v. Dalton Engineering and Construction Company Limited, (Respondent). (*Withdrawn*).

1002-83-M: Local 1200 of the International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Meteor Painting Contracting Ltd. of the Ontario Painting Contractors Association, (Respondent). (*Withdrawn*).

1041-83-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1699 and Larry Bolton, (Applicant) v. Clow Darling Mechanical Contractors Limited, (Respondent). (*Withdrawn*).

1066-83-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. K. A. Mace Limited and Paul K. Mace Interior Supply, (Respondents). (*Granted*).

1090-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. W.A. Stephenson Mechanical Contractors Limited, (Respondent). (*Withdrawn*).

1101-83-M: International Union of Bricklayers and Allied Craftsmen – Local #1, Ontario, (Applicant) v. Comin Masonry Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF THE BOARD'S DECISION

1589-81-OH: Richard Arnold and Other Members of Local 127 U.A.W. International Harvester Bargaining Unit, (Complainants) v. International Harvester Company of Canada, Limited, Chatham, Ontario, (Respondent). (*Denied*).

1477-82-U: Kuljinder Singh Bhanga and Newman Nkrumah, (Complainants) v. United Food & Commercial Workers Local #287 and Charles Bonello, (Respondents) v. Caravelle Foods, (Intervener). (*Denied*).

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Decisions

October 83

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LR
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Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

CASES REPORTED

1. Alnor Earthmoving Limited; Re International Union of Operating Engineers, Local 793; Re Operating Engineers Employer Bargaining Agency	1603
2. American Can. Canada Inc.; Re Can Workers' Union, Local 354.....	1609
3. Campbell Red Lake Mines Limited; Re International Union of Operating Engineers, Local 793	1623
4. Canadian Dressed Meats Ltd.; Re Raymond Daviau; Re United Food and Commercial Workers	1628
5. Canadian Union of Operating Engineers and its Local 111 and Robert Whissell; Re Tom Norton and Professional and Clerical Workers of Canada	1633
6. Duron Ottawa Ltd.; Re Operative Plasterers and Cement Masons, Local 124 et al; Re Labourers' Union, Local 527; Re Labourers' Union, Ontario Provincial District Council	1639
7. Ellis, Susan E.; Re United Steelworkers of America	1645
8. Filtran Limited; Re IBEW, Local 2228	1647
9. Golden Griddle Restaurant, 470469 Ontario Limited, c.o.b. as; Re Hotel Employees Restaurant Employees Union, Local 75; Group of Employees	1651
10. The Great Atlantic and Pacific Company Limited and Retail Wholesale and Department Store Union, Local 414; Re Paul Atkinson and Edelmiro Vidal	1654
11. Imperial Clevite Canada Inc.; Re International Association of Machinists and Aerospace Workers; Group of Employees.....	1670
12. James River-Marathon Ltd., Pic River Forest Products Inc.; and Buchanan Forest Products Limited; Re Lumber and Sawmill Workers' Union, Local 2693 of the Carpenters Union	1672
13. Kingston General Hospital; Re ONA.....	1681
14. C.E. Lummus Canada Ltd.; Re Labourers' Union, Ontario Provincial District Council and Local 597; Re Labourer Relations Bureau of the Ontario General Contractors Association	1688
15. Marinaro, Donato et al; Re Labourers' Union, Local 1089 and Rocco D'Andrea....	1699
16. Price Waterhouse Limited and Canadian Imperial Bank of Commerce; Re London and District Service Workers Union, Local 220.....	1706
17. W. Rourke Ltd.; Re International Union of Operating Engineers, Local 793.....	1711

II

18.	SNC/FW Ltd.; Re International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local 128	1717
18.	St. Thomas-Elgin General Hospital and ONA; Re Anne Moore	1721
20.	Thunder Bay, Corporation of the City of,; Re ONA	1722
21.	Treco Machine & Tool Ltd.; Re International Association of Machinists and Aerospace Workers; Group of Employees	1725
22.	Verdi Forming United, Ontario Formwork Association, Labourers' Union, Local 183, Rampart Enterprises Limited and Metro Toronto Apartment Builders Association; Re Labourers' Union, Local 506; Re Formwork Council of Ontario	1728
23.	Vogue Brassiere Incorporated; Re International Ladies' Garment Workers' Union; Group of Employees	1737
24.	Wilco Canada Inc.; Re Robert Zizek	1759

SUBJECT INDEX

- Adjournment – Practice and Procedure – Unfair Labour Practice – Complaint filed and adjourned sine die with agreement of respondents brought on for hearing again – Complainant not denied compensation for period of adjournment where respondents' agreement to adjourn unconditional
- ST. THOMAS-ELGIN GENERAL HOSPITAL AND ONA; RE ANNE MOORE ... 1721
- Arbitration – Interference in Trade Unions – Practice and Procedure – Unfair Labour Practice – Collective agreement's prohibitions against discrimination because of union activity similar to Act's – Arbitrator finding no anti-union animus – Board deferring to arbitrator's award – Failure to recognize advocate nominated by individual employee not interference with union
- CANADIAN UNION OF OPERATING ENGINEERS AND ITS LOCAL 111 AND ROBERT WHISELL; RE TOM NORTON AND PROFESSIONAL AND CLERICAL WORKERS OF CANADA 1633
- Bargaining Unit – Construction Industry – Practice and Procedure – Long-standing Board policy to require displacement applicant to take all employees in incumbent's unit – Policy inappropriate in view of passage of s.144 – Applicant entitled to take cement masons without construction labourers – Jurisdiction claimed in provincial agreement not determinative as to whether employees cement masons or construction labourers
- DURON OTTAWA LTD.; RE OPERATIVE PLASTERERS AND CEMENT MASONS, LOCAL 124 ET AL; RE LABOURERS UNION, LOCAL 527; RE LABOURERS UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL..... 1639
- Bargaining Unit – Practice and Procedure – Representation Vote – Hours of work of homeworkers not recorded – Parties agreeing to determine hours by dividing income by minimum wage rate – Taking six week period to coincide with periods of payments – Employee found to be part-timer since worked less than 24 hours in majority of weeks in six week period – Incomplete and ambiguous representations by union not influencing vote – Board not directing new vote
- FILTRAN LIMITED; RE IBEW, LOCAL 2228..... 1647
- Bargaining Unit – Practice and Procedure – Technical employees better educated, better paid and having greater responsibility – Union support among technical employees low – Not reasons to depart from policy of encompassing office, clerical and technical employees in one unit – Not causing Board to direct vote
- IMPERIAL CLEVITE CANADA INC.; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; GROUP OF EMPLOYEES 1670
- Change in Working Conditions – Discharge for Union Activity – Unfair Labour Practice – Employee discharged for bootlegging – Irrespective of fairness Board satisfied no anti-union animus involved – Absence of specific company rule prohibiting bootlegging immaterial – Freeze provisions not applicable

CAMPBELL RED LAKE MINES LIMITED; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793	1623
Constitutional Law – Construction Industry – Respondent’s employees laying pipes for federally regulated companies – Not doing any repair work or hook up – Whether function integral to federal undertaking – Board finding work within provincial jurisdiction – ICI sector not encompassing work done in public domain	
W. ROURKE LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793.....	1711
Construction Industry – Bargaining Unit – Practice and Procedure – Long-standing Board policy require displacement applicant to take all employees in incumbent’s unit – Policy inappropriate in view of passage of s.144 – Applicant entitled to take cement masons without construction labourers – Jurisdiction claimed in provincial agreement not determinative as to whether employees cement masons or construction labourers	
DURON OTTAWA LTD.; RE OPERATIVE PLASTERERS AND CEMENT MASONS, LOCAL 124 ET AL; RE LABOURERS UNION, LOCAL 527; RE LABOURERS UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL.....	1639
Construction Industry – Constitutional Law – Respondent’s employees laying pipes for federally regulated companies – Not doing any repair work or hooking up – Whether function integral to federal undertaking – Board finding work within provincial jurisdiction – ICI sector not encompassing work done in public domain	
W. ROURKE LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793.....	1711
Construction Industry – Construction Industry Grievance – Province-wide agreement containing several wage schedules – Whether respondent entitled to pay according to schedule providing for lower rates – Whether restriction of low rate schedule to members of Employer Bargaining Agency discriminatory	
ALNOR EARTHMOVING LIMITED; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE OPERATING ENGINEERS EMPLOYER BARGAINING AGENCY	1603
Construction Industry – Practice and Procedure – Unfair Labour Practice – Local 506 having exclusive bargaining rights for framework labourers under province-wide agreement – Formwork subcontracted to employer having agreement with Local 183 to use its members – Minister’s designation clearly exempting Local 183’s relationship – Arrangement between general, sub-contractor and Local 183 not affected by s.146 – Complaint dismissed as not disclosing prima facie case	
VERDI FORMING LIMITED, ONTARIO FORMWORK ASSOCIATION, LABOURERS’ UNION, LOCAL 183, RAMPART ENTERPRISES LIMITED AND METRO TORONTO APARTMENT BUILDERS ASSOCIATION; RE LABOURERS’ UNION, LOCAL 506; RE FORMWORK COUNCIL OF ONTARIO	1728
Construction Industry Grievance – Construction Industry – Province-wide agreement containing several wage schedules – Whether respondent entitled to pay according to schedule providing for lower rates – Whether restriction of lower rate schedule to members of Employer Bargaining Agency discriminatory	

ALNOR EARTHMOVING LIMITED; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE OPERATING ENGINEERS EMPLOYER BARGAINING AGENCY	1603
Construction Industry Grievance – Employee demanding payment for fellow employees for wrongful work assignment – Board finding employee played leadership role in unlawful strike – collective agreement requiring employee as steward to assist employer in enforcing collective agreement – Board refusing to substitute penalty of discharge in circumstances	
SNC/FW LTD.; RE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 128	1717
Discharge for Union Activity – Change in Working Conditions – Unfair Labour Practice – Employee discharged for bootlegging – Irrespective of fairness Board satisfied no anti-union animus involved – Absence of specific company rule prohibiting bootlegging immaterial – Freeze provisions not applicable	
CAMPBELL RED LAKE MINES LIMITED; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793	1623
Duty of Fair Representation – Unfair Labour Practice – Union’s undertaking to pressure confidentiality of negotiations preventing disclosure of seniority position upon equipment removal – Union agreeing to transfer complainants’ seniority to bottom of mainstream list reasonable in circumstances – Union failure to consult complainants prior to making proposal not breach – Union not required to take individual items back to membership during negotiations – Ratification vote sufficient safeguard	
THE GREAT ATLANTIC AND PACIFIC COMPANY LIMITED AND RETAIL WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 414; RE PAUL ATKINSON AND EDELMIRO VIDAL	1654
Duty of Fair Representation – Unfair Labour Practice – Whether settlement of grievance short of arbitration constituting breach – Review of extent of union’s duty in settling grievances	
CANADIAN DRESSED MEATS LTD.; RE RAYMOND DAVIAU; RE UNITED FOOD AND COMMERCIAL WORKERS	1628
Duty to Bargain in Good Faith – Unfair Labour Practice – Employer refusing to execute agreed upon collective agreement unless local union named – Bargaining rights held by ONA – Board finding bad faith bargaining and refusal to recognize bargaining agent – Directing execution of draft agreement	
THUNDER BAY, CORPORATION OF THE CITY OF; RE ONA	1722
Employee – Interference in Trade Unions – Several employer attempts to have unit supervisors excluded as managerial unsuccessful – Employer assigning grievance and disciplinary functions not unlawful in absence of anti-union animus	
KINGSTON GENERAL HOSPITAL; RE ONA	1681
Employee – Unfair Labour Practice – Lawyer recognized and treated as within bargaining unit on agreement of all parties – Union continuing to discuss lawyer’s work conditions after lawyer renounced union membership – Discussion of terms to be applied	

to exclude a person not illegal – s.1(3)(a) definition provision and not capable of violation	
ELLIS, SUSAN E.; RE UNITED STEELWORKERS OF AMERICA.....	1645
Health and Safety – Employee warned twice for not wearing air hat when entering lead-pot – Later required to enter lead-pot with only face mask as air hat being repaired – Whether refusal because of safety concern – Suspension not justified – No duty to “work now and grieve later” where safety concern	
WILCO CANADA INC.; RE ROBERT ZIZEK.....	1759
Interference in Trade Unions – Arbitration – Practice and Procedure – Collective agreement’s prohibitions against discrimination because of union activity similar to Act’s – Arbitrator finding no anti-union animus – Board deferring to arbitrator’s award – Failure to recognize advocate nominated by individual employee not interference with union	
CANADIAN UNION OF OPERATING ENGINEERS AND ITS LOCAL 111 AND ROBERT WHISSELL; RE TOM NORTON AND PROFESSIONAL AND CLERICAL WORKERS OF CANADA	1633
Interference in Trade Unions – Employee – Several employer attempts to have unit supervisors excluded as managerial unsuccessful – Employer assigning grievance and disciplinary functions not unlawful in absence of anti-union animus	
KINGSTON GENERAL HOSPITAL; RE ONA	1681
Interference in Trade Unions – Lockout – Unfair Labour Practice – Employer faced with financial problem seeking relief from obligations under provincial agreement – Imposing reduced hours as alternative on members of union refusing concession – Elements of lockout established – Reliance upon concession agreed to by major trade on project no justification – No undue pressure to grant concession established – Arrangement inconsistent with provincial agreement breach of s.146(2)	
C. E. LUMMUS CANADA LTD.; RE LABOURERS’ UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LOCAL 597; RE LABOUR RELATIONS BUREAU OF THE ONTARIO GENERAL CONTRACTORS ASSOCIATION	1688
Interference in Trade Unions – Petition – Petition activity on plant floor during work hours in view of management – Whether granting of “unusual” benefits during organizing campaign seen as bribe to keep union out – Whether remarks about job security made in abstract influencing petition – Board finding petition not voluntary – Review of limits of free speech protection for employer communications	
VOGUE BRASSIERE INCORPORATED; RE INTERNATIONAL LADIES’ GARMENT WORKERS’ UNION; GROUP OF EMPLOYEES	1737
Interference in Trade Unions – Unfair Labour Practice – Employer seeking concessions to remain competitive in industry – Union refusing to meet to discuss concessions – Employer letters to employees protected by free speech proviso – Past practice of employer communication with employees without objection from union – Content of communication innocuous – Purpose of getting employees to pressure union to meet – Not attempt to circumvent bargaining agent – Board expressing concern as to senior management talking to individuals – Finding no interference in circumstances	

AMERICAN CAN CANADA INC.; RE CAN WORKERS' UNION, LOCAL 354..	1609
Lockout – Interference in Trade Unions – Unfair Labour Practice – Employer faced with financial problem seeking relief from obligations under provincial agreement – Imposing reduced hours as alternative on members of union refusing concession – Elements of lockout established – Reliance upon concession agreed to by major trade on project no justification – No undue pressure to grant concession established – Arrangement inconsistent with provincial agreement breach of s.146(2)	
C.E. LUMMUS CANADA LTD.; RE LABOURERS' UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LOCAL 597; RE LABOUR RELATIONS BUREAU OF THE ONTARIO GENERAL CONTRACTORS ASSOCIATION	1688
Petition – Interference in Trade Unions – Petition activity on plant floor during work hours in view of management – Whether granting of “unusual” benefits during organizing campaign seen as bribe to keep union out – Whether remarks about job security made in abstract influencing petition – Board finding petition not voluntary – Review of limits of free speech protection for employer communications	
VOGUE BRASSIERE INCORPORATED; RE INTERNATIONAL LADIES' GARMENT WORKERS' UNION; GROUP OF EMPLOYEES	1737
Practice and Procedure – Adjournment – Unfair Labour Practice – Complaint filed and adjourned sine die with agreement of respondents brought on for hearing again – Complainant not denied compensation for period of adjournment where respondents' agreement to adjourn unconditional	
ST. THOMAS-ELGIN GENERAL HOSPITAL AND ONA; RE ANNE MOORE ...	1721
Practice and Procedure – Arbitration – Interference in Trade Unions – Unfair Labour Practice – Collective agreement's prohibitions against discrimination because of union activity similar to Act's – Arbitrator finding no anti-union animus – Board deferring to arbitrator's award – Failure to recognize advocate nominated by individual employee not interference with union	
CANADIAN UNION OF OPERATING ENGINEERS AND ITS LOCAL 111 AND ROBERT WHISSELL; RE TOM NORTON AND PROFESSIONAL AND CLERICAL WORKERS OF CANADA	1633
Practice and Procedure – Bargaining Unit – Construction Industry – Long-standing Board policy to require displacement applicant to take all employees in incumbent's unit – Policy inappropriate in view of passage of s.144 – Applicant entitled to take cement masons without construction labourers – Jurisdiction claimed in provincial agreement not determinative as to whether employees cement masons or construction labourers	
DURON OTTAWA LTD.; RE OPERATIVE PLASTERERS AND CEMENT MASONS, LOCAL 124 ET AL; RE LABOURERS' UNION, LOCAL 527; RE LABOURERS UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL.....	1639
Practice and Procedure – Bargaining Unit – Representation Vote – Hours of work of homeworkers not recorded – Parties agreeing to determine hours by dividing income by minimum wage rate – taking six week period to coincide with periods of payment – Employee found to be part-timer since worked less than 24 hours in majority of weeks in six week period – Incomplete and ambiguous representations by union not influencing vote – Board not directing new vote	

VIII

FILTRAN LIMITED; RE IBEW, LOCAL 2228.....	1647
Practice and Procedure – Bargaining Unit – Technical employees better educated, better paid and having greater responsibility – Union support among technical employees low – Not reasons to depart from policy of encompassing office, clerical and technical employees in one unit – Not causing Board to direct vote	
IMPERIAL CLEVITE CANADA INC.; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; GROUP OF EMPLOYEES	1670
Practice and Procedure – Construction Industry – Unfair Labour Practice – Local 506 having exclusive bargaining rights for formwork labourers under province-wide agreement – Formwork subcontracted to employer having agreement with Local 183 to use its members – Minister's designation clearly exempting Local 183's relationship – Arrangement between general, sub-contractor and Local 183 not affected by s.146 – Complaint dismissed as not disclosing prima facie case	
VERDI FORMING LIMITED, ONTARIO FORMWORK ASSOCIATION, LABOURERS' UNION, LOCAL 183, RAMPART ENTERPRISES LIMITED AND METRO TORONTO APARTMENT BUILDERS ASSOCIATION; RE LABOURERS' UNION, LOCAL 506; RE FORMWORK COUNCIL OF ONTARIO	1728
Practice and Procedure – Remedies – Unfair Labour Practice – Respondent found in breach of Act filing application for judicial review – Union deciding not to seek enforcement pending judicial review – Judicial review adjourned and Board proceedings frozen to permit settlement discussions – Union entitled to seek enforcement after settlement discussions break down – Board finding non-compliance and filing order in Courts	
TRECO MACHINE & TOOL LTD.; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; GROUP OF EMPLOYEES	1725
Practice and Procedure – Representation Vote – Parties agreeing to voters' list excluding individual – Person not in list casting segregated ballot – Employer signing waiver document agreeing on eligibility to vote – Board holding employer to waiver document – Need for finality of waiver document discussed	
GOLDEN GRIDDLE RESTAURANT, 470469 ONTARIO LIMITED, C.O.B. AS; RE HOTEL EMPLOYEES UNION, LOCAL 75; GROUP OF EMPLOYEES.....	1651
Practice and Procedure – Unfair Labour Practice – Respondent not entitled to raise delay where respondent's unlawful conduct caused delay – Board finding one complainants' delay not extreme to cause refusal to hear – Delay in filing complaint and particulars to be considered in exercising remedial discretion – Board refusing to inquire into other complaint because of delay	
MARINARO, DONATO ET AL; RE LABOURERS' UNION, LOCAL 1089 AND ROCCO D'ANDREA.....	1699
Related Employer – Sale of a Business – Creditor bank appointing receiver and manager under debenture instrument – Receiver honouring terms of collective agreement and running nursing home until suitable purchaser found – Whether bank and/or receiver successor employers – Whether responsible for past breaches of agreement by nursing home – Conditions for related employer declaration not made out	

PRICE WATERHOUSE LIMITED AND CANADIAN IMPERIAL BANK OF COMMERCE; RE LONDON AND DISTRICT SERVICE WORKERS UNION, LOCAL 220	1706
Remedies – Practice and Procedure – Unfair Labour Practice – Respondent found in breach of Act filing application for judicial review – Union deciding not to seek enforcement pending judicial review – Judicial review adjourned and Board proceedings frozen to permit settlement discussions – Union entitled to seek enforcement after settlement discussions break down – Board finding non-compliance and filing order in Courts	
TRECO MACHINE & TOOL LTD.; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; GROUP OF EMPLOYEES	1725
Representation Vote – Bargaining Unit – Practice and Procedure – Hours of work of homeworkers not recorded – Parties agreeing to determine hours by dividing income by minimum wage rate – Taking six week period to coincide with periods of payment – Employee found to be part-timer since worked less than 24 hours in majority of weeks in six week period – Incomplete and ambiguous representations by union not influencing vote – Board not directing new vote	
FILTRAN LIMITED; RE IBEW, LOCAL 2228.....	1647
Representation Vote – Practice and Procedure – Parties agreeing to voters’ list excluding individual – Person not in list casting segregated ballot – Employer agreeing to count segregated ballot and signing waiver document agreeing on eligibility to vote – Board holding employer to waiver document – Need for finality of waiver document discussed	
GOLDEN GRIDDLE RESTAURANT, 470469 ONTARIO LIMITED, C.O.B. AS; RE HOTEL EMPLOYEES RESTAURANT EMPLOYEES UNION, LOCAL 75; GROUP OF EMPLOYEES.....	1651
Sale of a Business – Related Employer – Creditor bank appointing receiver and manager under debenture instrument – Receiver honouring term of collective agreement and running nursing home until suitable purchase found – Whether bank and/or receiver successor employers – Whether responsible for past breaches of agreement by nursing home – Conditions for related employer declaration not made out	
PRICE WATERHOUSE LIMITED AND CANADIAN IMPERIAL BANK OF COMMERCE; RE LONDON AND DISTRICT SERVICE WORKERS UNION, LOCAL 220	1706
Sale of a Business – Respondent acquiring pulp mill and woodlands operation – Simultaneously transferring woodlands operation to third company while retaining licence to timber limits, right of first refusal, reversion etc. – Whether respondent successor employer with respect to woodlands operation	
JAMES RIVER-MARATHON LTD., PIC RIVER FOREST PRODUCTS INC., AND BUCHANAN FOREST PRODUCTS LIMITED; RE LUMBER AND SAWMILL WORKERS’ UNION, LOCAL 2693 OF THE CARPENTERS UNION	1672
Unfair Labour Practice – Arbitration – Interference in Trade Unions – Practice and Procedure – Collective agreement’s prohibitions against discrimination because of union activity similar to Act’s – Arbitration finding no anti-union animus – Board deferring to arbitrator’s award – Failure to recognize advocate nominated by individual employee not interference with union	

CANADIAN UNION OF OPERATING ENGINEERS AND ITS LOCAL 111 AND ROBERT WHISELL; RE TOM NORTON AND PROFESSIONAL AND CLERICAL WORKERS OF CANADA	1633
Unfair Labour Practice – Adjourment – Practice and Procedure – Complaint filed and adjourned sine die with agreement of respondents brought on for hearing again – Complainant not denied compensation for period of adjournment where respondents' agreement to adjourn unconditional	
ST. THOMAS-ELGIN GENERAL HOSPITAL AND ONA; RE ANNE MOORE ...	1721
Unfair Labour Practice – Change in Working Conditions – Discharge for Union Activity – Employee discharged for bootlegging – Irrespective of fairness Board satisfied no anti-union animus involved – Absence of specific company rule prohibiting bootlegging immaterial – Freeze provisions not applicable	
CAMPBELL RED LAKE MINES LIMITED; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793	1623
Unfair Labour Practice – Construction Industry – Practice and Procedure – Local 506 having exclusive bargaining rights for formwork labourers under province-wide agreement – Formwork subcontracted to employer having agreement with Local 183 to use its members – Minister's designation clearly exempting Local 183's relationship – Arrangement between general, sub-contractor and Local 183 not affected by s.146 – Complaint dismissed as not disclosing prima facie case	
VERDI FORMING LIMITED, ONTARIO FORMWORK ASSOCIATION, LABOURERS' UNION, LOCAL 183, RAMPART ENTERPRISES LIMITED AND METRO TORONTO APARTMENT BUILDERS ASSOCIATION; RE LABOURERS' UNION, LOCAL 506; RE FORMWORK COUNCIL OF ONTARIO	1728
Unfair Labour Practice – Duty of Fair Representation – Union's undertaking to preserve confidentiality of negotiations preventing disclosure of seniority position upon equipment removal – Union agreeing to transfer complainants' seniority to bottom of mainstream list reasonable in circumstances – Union failure to consult complainants prior to making proposal not breach – Union not required to take individual items back to membership during negotiations – Ratification vote sufficient safeguard	
THE GREAT ATLANTIC AND PACIFIC COMPANY LIMITED AND RETAIL WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 414; RE PAUL ATKINSON AND EDELMIRO VIDAL	1654
Unfair Labour Practice – Duty of Fair Representation – Whether settlement of grievance short of arbitration constituting breach – Review of extent of union's duty in settling grievances	
CANADIAN DRESSED MEATS LTD.; RE RAYMOND DAVIAU; RE UNITED FOOD AND COMMERCIAL WORKERS.....	1628
Unfair Labour Practice – Duty to Bargain in Good Faith – Employer refusing to execute agreed upon collective agreement unless local union named – Bargaining rights held by ONA – Board finding bad faith bargaining and refusal to recognize bargaining agent – Directing execution of draft agreement	

THUNDER BAY, CORPORATION OF THE CITY OF.; RE ONA.....	1722
Unfair Labour Practice – Employee – Lawyer recognized and treated as within bargaining unit on agreement of all parties – Union continuing to discuss lawyer's work conditions after lawyer renounced union membership – Discussions of terms to be applied to excluded persons not illegal – S.1(3)(a) definition provision and not capable of violation	
ELLIS, SUSAN E.; RE UNITED STEELWORKERS OF AMERICA.....	1645
Unfair Labour Practice – Interference in Trade Unions – Employer seeking concessions to remain competitive in industry – union refusing to meet to discuss concessions – Employer letters to employees protected by free speech proviso – Past practice of employer communication with employees without objection from union – Content of communication innocuous – Purpose of getting employees to pressure union to meet – Not attempt to circumvent bargaining agent – Board expressing concern as to senior management talking to individuals – Finding no interference in circumstances	
AMERICAN CAN CANADA INC.; RE CAN WORKERS' UNION, LOCAL 354..	1609
Unfair Labour Practice – Interference in Trade Unions – Lockout – Employer faced with financial problem seeking relief from obligations under provincial agreement – Imposing reduced hours as alternative on members of union refusing concession – Elements of lockout established – Reliance upon concession agreed to by major trade on project no justification – No undue pressure to grant concession established – Arrangement inconsistent with provincial agreement breach of s.146(2)	
C.E. LUMMUS CANADA LTD.; RE LABOURERS' UNION, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LOCAL 597; RE LABOUR RELATIONS BUREAU OF THE ONTARIO GENERAL CONTRACTORS ASSOCIATION	1688
Unfair Labour Practice – Practice and Procedure – Remedies – Respondent found in breach of Act filing application for judicial review – Union deciding not to seek enforcement pending judicial review – Judicial review adjourned and Board proceedings frozen to permit settlement discussions – Union entitled to seek enforcement after settlement discussions break down – Board finding non-compliance and filing order in Courts	
TRECO MACHINE & TOOL LTD.; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; GROUP OF EMPLOYEES	1725
Unfair Labour Practice – Practice and Procedure – Respondent not entitled to raise delay where respondent's unlawful conduct caused delay – Board finding one complainants' delay not extreme to cause refusal to hear – Delay in filing complaint and particulars to be considered in exercising remedial discretion – Board refusing to inquire into other complaint because of delay	
MARINARO, DONATO ET AL; RE LABOURERS' UNION, LOCAL 1089 AND ROCCO D'ANDREA.....	1699

0903-80-M International Union of Operating Engineers, Local 793, Applicant, v. **Alnor Earthmoving Limited**, Respondent, v. Operating Engineers Employer Bargaining Agency, Intervener

Construction Industry – Construction Industry Grievance – Province-wide agreement containing several wage schedules – Whether respondent entitled to pay according to schedule providing for lower rates – Whether restriction of lower rate schedule to members of Employer Bargaining Agency discriminatory

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *B. Chercover for the applicant; R. A. Werry for the respondent; B. Binning and J. Thomson for the intervener.*

DECISION OF IAN C. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER B. L. ARMSTRONG; October 12, 1983

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.

2. Although the Toronto & District Excavators Association was given notice of the hearing at which the matters dealt within this decision were litigated, the Association chose not to attend at the hearing.

3. The grievance before the Board alleges a violation of the 1980-1982 provincial agreement entered into between the Operating Engineers Employee Bargaining Agency and the Operating Engineers Employer Bargaining Agency. The evidence before us indicates that prior to the advent of provincial bargaining, the International Union of Operating Engineers, Local 793 ("Local 793") was certified by this Board to represent equipment operators in the employ of the respondent, Alnor Earthmoving Limited ("Alnor") in all sectors in the Board's geographic area #8, which takes in the greater Toronto area. Local 793 and Alnor never entered into a collective agreement. However, due to the effect of the provincial bargaining sections of the Act, Alnor became bound to the terms of the provincial agreement in the industrial, commercial and institutional sector of the construction industry (the "ICI sector"). The provincial agreement purported on its face to be a multi-sector agreement. However, the parties are in agreement that it was binding on Alnor only with respect to ICI work.

4. Alnor is an excavating firm which is very active in road construction. Although not contractually required to do so, when performing road work in the Toronto area Alnor has apparently always applied the terms of a collective agreement between Local 793 and the Metropolitan Toronto Road Builders Association. The company has not only paid its employees the wage rates specified in the agreement but has also made payments to certain trust funds provided for in the agreement. Insofar as its work in the roads sector is concerned, Local 793 has no complaint with Alnor. Indeed, in giving his testimony, Mr. E. Ford, the Local's labour relations manager, commented, "Alnor is a good contractor, he's a good employer".

5. The grievance arises out of certain work performed by Alnor at the Toronto In-

ternational Airport. This work apparently involved site preparation for a new Wardair hanger, as well as the construction of an apron, taxi-ways, roads and a parking lot. Alnor employed members of Local 793 to do the work, and paid them the rates provided for under the road builders collective agreement. Local 793, however, contends that the work in question fell within the ICI sector, and that the employees were entitled to the higher wage rates provided for in the provincial agreement.

6. Alnor initially took the position that the work at the airport came within the roads sector of the construction industry and accordingly the provincial agreement did not apply. This contention resulted in an application being made to have the Board make a determination under section 150 of the Act as to whether or not the work came within the ICI sector. When the section 150 issue came on for hearing, Local 793 and Alnor advised the Board that rather than have the matter litigated, they had entered into an agreement in the following terms:

“The parties have agreed that without admission as to whether the work in question falls within the industrial, commercial and institutional sector or not, and without prejudice to the parties in any future sector determination, the respondent agrees to pay the rates under the Provincial Collective Agreement.”

7. The agreement that Alnor would pay the wage rates under the provincial agreement did not result in a settlement of the grievance. The provincial agreement contained a number of appendices, with each appendix providing for different wage rates and other conditions of employment. Local 793 contends that the schedule applicable to Alnor was Schedule “J”, whereas Alnor contends it was Schedule “D” which provided for a lower rate of wages. At the hearing, the parties reviewed the historical development of the schedules, and in particular the origin of Schedule “D”.

8. Prior to the advent of provincial bargaining a number of employer groups negotiated separate collective agreements with Local 793. One of these employer groups was the Toronto & District Excavators Association which bargained on behalf of certain of excavating firms in the Toronto area. Excavating firms tend to work in a number of different sectors, particularly the ICI sector and the roads sector. Apparently, in most parts of Ontario, an excavating firm employing Local 793 members works under a “Roads” agreement in the road sector, and a different collective agreement, with a much higher wage rate, in the ICI sector. So as to avoid this situation in the Toronto area, the Toronto & District Excavators Association negotiated a multi-sector agreement with Local 793 which called for the association’s member companies to pay a single wage rate regardless of the sector in which they were working. This single wage rate was higher than the rate called for in an agreement between Local 793 and the Metropolitan Toronto Road Builders Association but less than the rate called for on ICI work. Because of its position between these two wage rates, the Excavators Association wage rate came to be referred to as a “mid-line” rate.

9. With the advent of provincial bargaining in 1978 the Toronto & District Excavators Association, and seven other employer associations, were jointly designated as the Operating Engineers Employer Bargaining Agency. In negotiations for a first provincial agreement, it was agreed that the provincial agreement would consist of a “master portion” as well as a series of schedules setting out various wage rates, and other conditions of employment. These schedules reflected the bargaining structure in existence prior to provincial bargaining. There was

a schedule for each part of the province setting out certain “general” wage rates, as well as schedules for a variety of specialty contractors. The general appendix for the Toronto area was Schedule “J” which read as follows:

“This Schedule shall cover and apply to Employers engaged in all work other than the work covered by Schedules “A”, “B”, “C” & “D” her-eof and without limiting the generality of the foregoing BUILDING AND CONSTRUCTION WORK within Metropolitan Toronto, the Regional Municipalities of Peel, York, Durham, the Counties of Simcoe, Muskoka, Victoria, Haliburton, Peterborough and that portion of Northumberland lying west of a line running north from Colborne to McCrackens Landing and that portion of the Regional Municipality of Halton lying east of #25 Highway”.

10. The Schedules “A” through “D” referred to in Schedule “J” each dealt with a specialized part of the construction industry which historically had been covered by a separate collective agreement. The headings to the first three schedules were as follows:

Schedule “A”

This Schedule shall cover and apply to Employers engaged in the CRANE AND EQUIPMENT RENTAL BUSINESS within the Province of Ontario.

Schedule “B”

This Schedule shall cover and apply to Employers engaged in the STEEL ERECTION OR MECHANICAL INSTALLATIONS BUSINESS within the Province of Ontario.

Schedule “C”

This Schedule shall cover and apply to Employers engaged in the FOUNDATION, PILING AND CAISSON BORING BUSINESS within the Province of Ontario.

11. Schedule “D” was the “excavating schedule” to the provincial agreement. The heading to Schedule “D”, was different from the headings on Schedules “A” through “C” in that it referred not simply to employers engaged in the excavating business, but to employers who are members of the Toronto & District Excavators Association engaged in the excavating business. The evidence indicates that during the negotiations for the first provincial agreement, the headings to all of the schedules were drafted by Mr. Ford, Local 793’s labour relations manager. Mr. Ford testified that the reference in Schedule “D” to members of the Toronto & District Excavators Association had been inserted at the insistence of Mr. White, the manager of the Association, who indicated he felt that non-members should not have access to Schedule “D”, but instead should be required to pay the higher rates under Schedule “J”. The heading to Schedule “D” read as follows:

Schedule "D"

This Schedule shall cover and apply to Employers that are member Companies of the Toronto & District Excavators Association engaged in the EXCAVATING BUSINESS within Labour Board Area #8.

12. Although the heading to Schedule "D" was drafted by Mr. Ford after his discussion with Mr. White, it was approved by both the employee and employer bargaining agencies. Alnor called as witnesses Mr. J. Thomson, an officer of the Ontario General Contractors Association, as well as Mr. B. Binning, legal counsel to both the Association and the Employer Bargaining Agency. The Ontario General Contractors Association was one of the eight employer associations jointly designated as the Operating Engineers Employer Bargaining Agency. Both Mr. Thomson and Mr. Binning indicated that at the time the first provincial agreement was entered into, it was their understanding that a general contractor directly employing Local 793 members to do excavating work in the Toronto area was required to apply Schedule "J", but that if the work was contracted out to an excavation contractor, the contractor could pay the lower wage rates provided for in Schedule "D". Mr. Thomson and Mr. Binning both stated that they had understood Schedule "D" to be applicable to all excavating contractors working in Board Area #8, and not only to members of the Toronto & District Excavators Association. Mr. Binning testified that in his view the Employer Bargaining Agency would never have agreed to the wording of Schedule "D" had it been aware that the wording might be interpreted to limit access to the schedule only to members of the Toronto & District Excavators Association. In this regard, Mr. Binning stated that such an interpretation would effectively limit the number of excavating firms that general contractors could sub-let work to. Mr. Binning also indicated that he felt that such an interpretation would give an unlawful preference to members of the Toronto & District Excavators Association.

13. The first provincial agreement was replaced by the 1980-82 provincial agreement, which was the agreement under which the grievance now before us was filed. The 1980-82 agreement continued the format of the earlier agreement, and apparently during negotiations no consideration was given to the heading on the various appendices. It appears that prior to these proceedings, the issue never arose as to whether an excavating contractor not belonging to the Toronto & District Excavators Association was required to apply Schedule "J" to excavation work in Board Area #8. Alnor had previously done some excavating work in Board area #8, but had always contended that the work involved was within the roads sector. In that Alnor was only bound to the provincial agreement in the ICI sector, it was not obliged to apply either Schedule "D" or "J" on road work and in fact Alnor paid the lower wage rates called for in the road builders agreement. From the evidence we surmise that most excavators who are bound to the provincial agreement and who perform ICI work in the Toronto area are in fact members of the excavators association and accordingly pay the excavation rate on both road sector and ICI sector work. There are, however, a number of excavating contractors who are in contractual relations with Local 793 and who do excavation work in Board area #8 but who do not belong to the Excavators Association. These firms, which Local 793 refers to as "independents", have signed "pick-up" agreements with the local which require them to apply the master portion of view the Employer Bargaining Agency would never have agreed to the wording of Schedule "D" had it been aware that pay the wage rates provided for in Schedule "D" on both road and ICI excavation work notwithstanding the fact that they are not members of the Toronto & District Excavators Association.

14. There is nothing in the evidence to suggest that membership in the Toronto & District Excavators Association is not open to all excavating contractors active in the Toronto area. When a contractor joins the Association during the term of a provincial agreement, the procedure is for the Association to so advise Local 793. The Local then either agrees, or notes its objection in writing to the contractor becoming bound to Schedule "D". Mr. Ford was not contradicted when he testified that the Local has only raised such an objection once, and that was with respect to a firm whose owner had a history of ignoring the terms of collective agreements entered into by companies under his control.

15. It might be noted at this point that certain employers belong to both the Metropolitan Toronto Road Builders Association and the Toronto & District Excavators Association and accordingly appear to be bound to both Schedule "D" and the road builders agreement. The evidence indicates that when these firms are the prime contractor on a road building job, Local 793 does not object to them paying the lower wage rate under the road builders agreement, but when they are engaged on a road project as an excavating contractor, they are expected to pay the rates set out in Schedule "D" of the provincial agreement.

16. In these proceedings, Local 793 takes the position that since Alnor was not a member of the Toronto & District Excavators Association it was not entitled to pay its employees the "mid-line" rate under Schedule "D", but rather should have paid the higher rates provided for in Schedule "J". It is the local's contention that it would be inequitable for Alnor to be allowed to pay the lower road rate on road excavation work and the mid-line rate on ICI work. The union further contends that if Alnor had wanted to take advantage of Schedule "D" it should have either joined the Excavators Association or signed a "pick-up" agreement. Alnor objects to it being required to take either step, since to do so would mean that it would be obliged to pay the Schedule "D" "mid-line" excavators rate in all sectors of the construction industry, including on road excavating work where it currently pays the lower road rate.

17. Both Alnor and the Operating Engineers Employer Bargaining Agency contend that when Schedules "D" and "J" of the provincial agreement are read together, it is reasonable to conclude that Alnor was entitled to pay the wage rates provided for in Schedule "D". In this regard they note that Schedule "J" states that it is applicable to employers "engaged in all work other than the *work* covered by Schedules "A", "B", "C" & "D". It is their contention that in order to ascertain the relevant *work* exempted from Schedule "J", one must look only at the work covered by Schedule "D", which is excavating work, the type of work Alnor was performing at the airport. We are unable to agree with this reasoning. We are satisfied that the most reasonable interpretation to be given the Provincial Agreement is that work is exempted from Schedule "J" under Schedule "D", if it is being performed by an employer member of the Toronto & District Excavators Association engaged in the excavating business in area #8. To reach any opposite conclusion would be to ignore completely part of the heading to Schedule "D". We do not believe that much weight can be given to the fact that Mr. Binning and the Ontario General Contractors Association understood that all excavators could take advantage of the wage rates provided for in Schedule "D" since this understanding was not shared by either Local 793 or the Toronto & District Excavators Association.

18. As an alternative position, Alnor contends that it cannot be barred from paying the wage rates set out in Schedule "D" due to section 151(2) of the Act which provides as follows:

“A designated or accredited employer bargaining agency shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers in the provincial unit of employers for which it bargains, whether members of the designated or accredited employer bargaining agency or not.”

19. Alnor’s contention is that it would have been discriminatory and hence unlawful for the designated employer bargaining agency to require that a firm such as Alnor pay higher wages to its employees simply because it is not a member of the Toronto & District Excavators Association, one of the component parts of the Employer Bargaining Agency. This contention was supported by the Employer Bargaining Agency. For its part, Local 793 contends that was not discriminatory for Alnor not to have access to Schedule “D” in that the wage rates set out in the schedule are meant to be available only to firms that are willing to apply them in all sectors. According to the Local, Alnor is seeking an unfair advantage by being able to pay the “mid-line” rate on ICI jobs and an even lower rate on road excavation work.

20. There can be no doubt that section 151(2) of the Act prohibits an employer bargaining agency from discriminating against an employer simply because it is not a member of the employer bargaining agency or one of its constituent parts. The instant proceedings, of course, do not involve a complaint by Alnor that the Employer Bargaining Agency discriminated against it. Rather, they arise out of an attempt by the union to enforce the terms of the provincial agreement. Notwithstanding this fact, for the purposes of this decision we are prepared to assume that if the application of an agreement provision will have a discriminatory result on an employer, then the discriminatory result should not be given effect to. We would note, however, that in our view, the term “discrimination” implies more than simply unequal treatment. Rather, it implies unequal or different treatment in situations where no reasonable basis exists to justify it. In this regard, we would refer to the fifth edition of Black’s Law Dictionary (West Publishing Co., St. Paul, Minn. 1979) which defines discrimination, in part, as:

“A failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.”

21. In this case, it cannot be said that no distinction existed between Alnor and members of the Excavators Association. The members of the association paid the “mid-line” rate on both road excavating work and ICI excavating work. Alnor, however, paid the lower “road” rate on road work. In our view, there is nothing inherently improper in requiring that a company which refuses to pay the “mid-line” rate to its employees on road jobs be required to pay the “regular” ICI rate on ICI jobs, and not the mid-line rate. The complicating factor in this case is that the heading to Schedule “D” does not purport to make the wage rates therein set out available to all firms willing to consistently pay the “mid-line” rate, but only the employer members of the Toronto & District Excavators Association.

22. There is no question but that due to the way the heading to Schedule “D” is framed the *potential* exists for a discriminatory result to occur. The potential would become more immediate if Local 793 were to actually adopt the position that a firm not belonging to the Excavators Association but willing to pay Schedule “D” rates on both ICI and road excavating work was required to pay Schedule “J” rates on ICI work due to its non-membership in the association. (As already indicated, to date the local has not taken this position, but has

instead signed “pick-up” agreements with such non-member firms). If such a situation were to arise, then the requirement of association membership in Schedule “D” might be of no force or effect, since otherwise it would lead to a discriminatory result. However, as we have indicated, in the instant case the application of the wording on Schedule “D” does not produce a discriminatory result. In that Alnor was not willing to pay the association “mid-line” rate on all its work, it had no legitimate claim to be able to pay the rate on ICI work. Given our reasoning set out above, we are satisfied that since Alnor was neither a member of the Toronto & District Excavators Association, nor in a situation comparable to that of the members of the Association, the applicable schedule of the provincial agreement binding on Alnor on the airport project was Schedule “J”.

23. Having regard to the above, we direct that Alnor now make the appropriate payments under Appendix “J”. The Board will remain seized of this matter in the event the parties are unable to agree on the amount involved.

24. The decision of Board Member J. A. Ronson will be forthcoming at a later date.

0849-83-U C.L.C. Local 354, Can Workers’ Union, Complainant, v. American Can Canada Inc., Respondent

Interference in Trade Unions – Unfair Labour Practice – Employer seeking concessions to remain competitive in industry – Union refusing to meet to discuss concessions – Employer letters to employees protected by free speech proviso – Past practice of employer communication with employees without objection from union – Content of communication innocuous – Purpose of getting employees to pressure union to meet – Not attempt to circumvent bargaining agent – Board expressing concern as to senior management talking to individuals – Finding no interference in circumstances

BEFORE: R. D. Howe, Vice-Chairman, and Board Members E. J. Brady and L. C. Collins.

APPEARANCES: *Edward H. Wright, Richard Roberts, Stuart Mutton, W. Moore and James Lang for the complainant; B. M. W. Paulin, Q.C., W. Jason M. Hanson, Anne McAllister and J. L. Salmon for the respondent.*

DECISION OF THE BOARD; October 21, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant (also referred to in this decision as “Local 354”) alleges that the respondent (also referred to in this decision as the “Company”) has contravened sections 64 and 67(1) of the Act.

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3. On August 17, 1983, after hearing and considering the submissions of the parties concerning the respondent’s request that the Board defer hearing this complaint pending dis-

position of a policy grievance filed by the complainant, the Board made the following oral ruling:

Counsel for the respondent contends that the Board should defer any hearing of the merits of this matter, pending arbitration of a grievance which has been filed by Local 354 in respect of a letter to employees dated July 15, 1983, which forms part of the subject matter of this section 89 complaint, in which Local 354 alleges that the respondent has contravened sections 64 and 67(1) of the Act. Having considered the submissions of the parties, we are unanimously of the view that this is not an appropriate case in which to defer to arbitration. The principles which the Board applies in determining when it will defer to grievance arbitration proceedings are set forth in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254. Having regard to those principles and to all of the circumstances of the present case, we are not prepared, in the exercise of our discretion under section 89 of the Act, to defer this matter to arbitration. This case raises significant issues concerning the extent to which an employer is entitled to communicate with his employees through letters and conversations in an attempt to enlist their aid in persuading their bargaining agent to meet with the employer during the term of a collective agreement to negotiate an extension agreement containing concessionary elements. Thus, we view the case as involving a situation in which sections 64 and 67(1) of the Act require elaboration. Thus, we are not satisfied that the present complaint is primarily contractual in nature and that the resolution through arbitration of the grievance in question, which covers only one aspect of the matters before us in the instant complaint, would be congruent with the resolution of this unfair labour practice. Indeed, it is questionable whether an arbitrator would have any jurisdiction under the terms of the collective agreement to deal with even the limited matter raised by the grievance alleging, as it does, only a violation of the recognition clause. In any event, we are of the view that principles concerning the extent to which an employer can communicate directly with his employees concerning such matters are best determined by this Board, charged as it is with continuing responsibility for the administration of the *Labour Relations Act*, rather than by arbitration under an individual collective agreement. Accordingly, the respondent's request that the Board defer to arbitration of grievance #83-13 is hereby denied.

4. The hearing was then recessed to afford the parties an opportunity to prepare an agreed statement of facts in an effort to expedite the hearing of the matter. At the hearing of the merits of this complaint on September 19, 1983, the parties filed with the Board the following agreed statement of facts:

1. Local 354 has represented the American Can employees at its Hamilton Plant for well over a quarter of a century. Other trade unions represent American Can employees at its other plants. Beginning in 1952, American Can had joint collective bargaining negotiations with Local 354 and with C.L.C. Local 353, Can Workers' Union (Montreal Plant) (hereinafter referred to as "Local 353"). In 1954, American Can negotiated

jointly with Local 354 and with Local 353 as well as C.L.C. Local 535, Can Workers' Union (Simcoe, Ontario Plant) (hereinafter referred to as "Local 535"). Subsequent to 1974, Local 354 as well as Locals 353 and 535 had ratification votes on an all-employee basis rather than on a plant-by-plant basis.

2. American Can is the employer party to a Master Collective Agreement with Local 354 as one of union parties which is effective from and after March 15, 1981 until March 18, 1984. Local 353 and Local 535 are the other union parties.

3. American Can regularly distributes to all employees a company magazine called "Intercan" and a Newsletter to its Hamilton Plant employees.

4. In the first quarter of 1983, the four major can companies in the United States, namely, American Can (U.S.), Continental Can, National Can and Crown, Cork & Seal negotiated an industry-wide "Extension Agreement" of their Master Collective Agreements with the United Steelworkers of America. This "Extension Agreement" made it possible for those companies to guarantee deliveries and prices until March, 1986.

5. At the same time, American Can's major competitor in Canada, Continental Can, reached a similar extension agreement with the United Steelworkers of America which covered Continental Can's Canadian operations.

6. In light of the resulting pressure that was exerted upon it by its customers, the Employer decided to approach Locals 354, 353 and 535 and asked them to meet with it to explain and discuss the current industry situation and the possibility of reaching an agreement which would permit American Can to offer to its customers conditions similar to those offered by Continental Can, namely guaranteed supply and prices into March, 1986.

7. During a discussion with Mr. J. Lang, President of Local 354, on March 24, 1983, Mr. R. Lomas, Director - Labour Relations of American Can, told Mr. Lang that the Employer would be approaching Local 354 to discuss the U.S. industry settlement. Mr. Lang stated he might agree to meet but no negotiations would take place until 1984.

8. In a letter dated April 7, 1983 to Mr. E. Wright, the Canadian Labour Congress Staff Representative for both the Hamilton and Simcoe Plants, American Can requested such a meeting. Mr. J. Lang, the President of Local 354, received a carbon copy of the letter. [That letter, which was attached as Schedule "A" to the agreed statement of facts, reads as follows:

Enclosed is a copy of the economic terms of settlement of an Ex-

tension Agreement recently reached between the major U.S. Can Industry manufacturers and the United Steelworkers of America. Essentially, this settlement extends the current Basic Agreement between the parties for a further two years, with only those modifications specified in the settlement letter.

As you are aware our major Canadian competitor is covered by the aforementioned Basic Agreement and therefore the Extension Agreement is applicable to all of its Canadian plant locations. Consequently, American Can's competitive position in the immediate future is seriously threatened, a situation which should be of grave concern to all employees.

It is imperative that a meeting be convened as soon as possible to discuss applying the economic provisions of the previously mentioned Extension Agreement to our Collective Agreement.

April 19, 20 or 21 are proposed as possible alternative dates for such meeting. Please contact us as soon as possible to confirm one of these dates.]

9. Local 353 and Local 535 agreed to attend the April 21 meeting, however, Local 354 did not attend the meeting. At that meeting, Mr. Wright did state that Local 354 would not meet until 1984. Mr. Lang stated on May 2, 1983 to Mr. Don Stewart, the Hamilton Plant Manager, that Local 354 would not meet with nor have any further discussion or contact with any officer of American Can and that if a meeting was proposed, he would not come. Mr. Lang added that there had already been a vote and that it had been agreed that there would be no concession negotiations with American Can. Mr. Lang restated this position to Mr. Stewart during subsequent conversations. Nevertheless, American Can copied Mr. Lang on all correspondence relative to the meetings with Local 353 and Local 535. [That correspondence, which was attached as Schedule "B" to the agreed statement, has been omitted.]

10. Agreements with Local 353 (Montreal) were reached during the first week of June and with Local 535 (Simcoe) on or about May 24, 1983, subject to ratification by the membership and approval by the Canadian Labour Congress. These ratifications and approvals were subsequently given. [The letters of approval, attached as Schedule "C" to the agreed statement, have been omitted.]

11. American Can continued its attempt to meet with Local 354 to discuss the situation. On May 30, 1983, Mr. Barry Pocock, American Can's Chief Executive Officer, attended at the Hamilton Plant. While Mr. Lang was unexpectedly absent on Jury Duty, Mr. Pocock did have a brief discussion with Mr. Earl Sharkey, Chief Steward of Local 354. Mr. Pocock advised Mr. Sharkey that the Employer wanted to discuss the situation with Local 354. Mr. Sharkey advised Mr. Pocock that he understood what

he was saying but that the membership had voted and agreed there would be no concessions; however, he would take the message to Mr. Lang and would respond to American Can's request. The response was that Local 354 would not meet.

12. The employees at the Hamilton Plant were aware that agreements had been made with Locals 353 and 535.

13. In an information letter dated July 5, 1983 above the signature of Barry Pocock, Chief Executive Officer of American Can, the Employer sought to explain and clarify its position to employees at the Hamilton plant. A summary of the agreement with Locals 353 and 535 was attached to the letter because of the historic relationship between American Can and those 3 locals. [That letter, which was attached to Schedule "D", reads as follows:

Dear Fellow Employee:

So much has been happening in our Industry lately, particularly as it affects our Company, that many of you have been asking your respective supervisors, "What's going on?"

I am writing to you personally simply to inform you and to convey my deep concern about the severe commercial problems facing our Company. Since several factors have combined to create a climate that jeopardizes the ability of our Company to compete in the marketplace, I believe everyone should be aware of the impact on Hamilton Plant and the measures that must be taken to counteract these factors.

You are all aware that our business dropped off sharply in 1982 due to the weak economy, new packaging and U. S. imports. These trends continue unabated through 1983 and have resulted in substantially reduced operations at all our Plants.

We are now faced with an additional competitive threat which, if unchallenged, will ant on Wednesday, July 13 and requested a meeting with him, the Local 354 Executive, and a represetend its current labour contract through 1986. C.C.C. is already taking advantage of this Agreement by offering our customers guaranteed supply for the next three years at controlled prices. Many of our customers are extremely interested in this approach and unless we can match that offer, we will certainly lose some major blocks of business.

The only way our Company can combat C.C.C.'s guarantees is to also secure extension agreements. The Unions representing our Vancouver, Kelowna, Simcoe and Montreal employees have already signed such extension agreements, having recognized the problems in our Industry. (Highlights of the Montreal/Simcoe extension agree-

ments are attached.) To date, however, your elected representatives in Hamilton have refused to even meet with us to discuss this most urgent matter. It is critical to the future of our Company that an extension agreement be negotiated *now*. The problems we are facing will not simply go away – they must be met and dealt with for the future well-being of us all. I urge you to support this view with your elected representative.

The attachment referred to in that letter reads:

ATTACHMENT

The Montreal/Simcoe extension agreements provide that:

- the present Collective Labour Agreement remains *unchanged* until its normal expiry on March 18, 1984 – *no take-aways*
- the Agreement will be extended for 24 months, to March 16, 1986
- no changes in general wages or benefits will occur
- C.O.L.A. will continue, although for the Extension period C.O.L.A. will be “folded-in” to wage rates annually, rather than quarterly
- anyone who retires during the Extension term will receive any pension increases negotiated in the 1986 negotiations on the effective dates of such increases
- should the Company subsequently negotiate a more favourable Can Industry Agreement with the U.S.W.A. prior to the Extension expiring, the changes negotiated would be passed on to Locals 353 and 535 of the C.W.F.U.

The above, if applied to Hamilton, would represent a superior agreement for Hamilton employees than the Continental Extension.]

14. In a letter dated July 8, 1983 Mr. Pocock advised Mr. Lang that he would be at the Hamilton Plant on Wednesday, July 13 and requested a meeting with him, the Local 354 Executive, and a representative of the Canadian Labour Congress. [That letter, attached as Schedule “E” to the agreed statement, reads:

On Wednesday, July 13, 1983, I will be visiting Hamilton plant and would like to take the opportunity at that time, to meet with your Local Union Executive, a representative of the Canadian Labour Congress, and yourself. The purpose of the meeting will be to discuss the necessity of implementing an extension to the current Labour Agreement.

You are well aware of the importance of this matter and your co-operation in attending this meeting will be appreciated.]

15. In a letter dated July 12, 1983, Mr. Lang advised Mr. Pocock that his request for a meeting had been rejected. Mr. Lang restated that in rejecting the request "we are only following the democratic wishes of our membership." [That letter, attached as Schedule "F" to the agreed statement, has been omitted.]

16. On July 13, 1983, Mr. Pocock attended at the Hamilton Plant, and he was accompanied by Mr. J. R. Carlisle and by Mr. J. A. Tucker. Mr. Carlisle is the Vice-President of the Employer, and Mr. Tucker is the Employer's Director of Manufacturing. Mr. Lang was not at the Plant that day because he was attending a funeral. Mr. Pocock and Messrs. Carlisle and Tucker briefly toured the Plant, and they spoke on an individual basis to a number of employees on the day shift in some of the departments at the Plant, that is maintenance, machine shop and coating. These management persons, during the course of their individual tours of those departments, talked to a number of employees, including some members of the Local 354 Executive. The said management persons asked some employees if they had received a copy of Mr. Pocock's letter of July 5, and they attempted to respond to questions which were put to them. Plant production was not stopped and the said management persons spoke to employees on a random basis. The said management persons did not speak to any employees from the other two shifts at the Hamilton Plant.

17. In a letter to Mr. Lang dated July 15, 1983 Mr. Pocock expressed disappointment at Mr. Lang's refusal to meet. Mr. Pocock restated his desire to meet with Local 354 in order to present to it American Can's concerns. In that letter he also advised Mr. Lang that he had toured the Plant and spoken to a number of employees on July 13. This letter was read to Mr. Lang over the telephone on July 18 by Mr. D. Stewart. Mr. Lang again refused to meet with Mr. Pocock expressed disappointment at Mr. Lang's refusal to meet. Mr. Pocock restated his desire to meet with Mr. Lang a confirming letter dated July 19. Subsequently, Mr. Lang acknowledged receipt of the July 19 letter. [Mr. Pocock's letter of July 15, 1983, attached as Schedule "G" to the agreed statement, reads as follows:

Thank you for your response, dated July 12, to my July 8 letter.

I was, of course, extremely disappointed at your refusal to meet to discuss this most urgent matter.

While in Hamilton on July 13, I did take the opportunity to tour the plant and speak to a number of employees. The employees asked a number of interesting questions which, although intelligent and thought provoking, indicated that they were not current on the details of the recent settlements in our Industry.

There is obviously misunderstanding which can be resolved by communication. A meeting such as I proposed may have accomplished this. In any event, it is imperative that our employees, your members, should be fully aware of the business and other considerations which could significantly impact job security.

There are obviously avenues by which you could overcome your present procedural difficulties and, in the interests of Hamilton plant, I urge you to look at such procedures and also to reconsider your position.]

18. In a letter to all Hamilton Plant employees dated July 15, 1983, Mr. Pocock expressed his pleasure at meeting a number of them and stated the he had wished to talk to Mr. Lang and the Local 354 Executive. Mr. Pocock also stated that Mr. Lang had rejected the meeting on the basis of membership wishes. [That letter, attached as Schedule "H" to the agreed statement, reads as follows:

It was a pleasure meeting and speaking with some of you last Wednesday. I was heartened that so many of you share my concern over the current state of our business. My primary purpose in visiting the plant was to meet with your Local Union President and Executive to convey that concern to them and to explain the necessity of negotiating an extension agreement now.

The response I received from your Local Union President to my request for a meeting was another refusal to discuss this critical issue. The reason given for the refusal was that the democratic wishes of the membership were being followed. If it is now your wish that meetings do take place, you are encouraged to voice your opinion to your Executive immediately. Market forces will not wait until your next regularly scheduled membership meeting in September.

I hope that we can work together to bring this matter to a successful conclusion this month.]

19. No further communications from American Can to the employees in the Local 354 bargaining unit have been made since July 15, 1983, except for the Plant Manager's Newsletter for the month of August, 1983.

20. On July 20, 1983, a letter from the Local 354 Executive to its membership was distributed at the Hamilton Plant. [That letter, attached as Schedule "I" to the agreement statement, reads:

Members of Local 354:

As usual during the summer months your union does not hold the regular monthly meetings, but if required, meetings are held by your Executive. This was so just recently, when we met to discuss the lat-

est moves by American Can to pressure us into talking with them about their so called 'need' for a contract extension; an extension such as Montreal and Simco [sic] have already been 'persuaded' into.

At our meeting we agreed that if (as Pocock's letter states) many of you have been asking "What is going on?", it's up to us, your '*Elected Representatives*', to answer that question and *not* the Chief Executive Officer of our employer, whose corporate interests obviously come before the interest of any of us employees.

Because there is no union meeting this month, we will attempt to answer that question with this letter.

Most of you, we are sure, do not have to ask "What is going on?", but for some who might be asking questions such as – "Why is the union not meeting with the company at this time?" – we would like to remind you that it was some months ago, with a great deal of foresight, a motion was put forward at that month's union meeting saying that no-one from this local would enter into any discussions with American Can regarding concessions.

That motion was passed unanimously and is still being upheld and supported by your union today.

That is why your President, Negotiating Committee, or any other union official cannot and will not meet with the company to discuss these issues until we are in a position to *bargain*, and that will be at the expiration of this present agreement.

Let us remind you that "no concessions" was and still is the position taken by the Canadian Labour Congress and this stand by Local 354 is consistent [sic] with ", – that statement is not even a questionable one because in our current contract we "roll-in" es must meet on relatively equal terms. To meet during a current agreement would put any union at a great disadvantage, and we would not wish to place Local 354 in that position.

Responding to Pocock's recent letters, we think each one of us should seriously question the validity of some of the statements made by him. Statements such as "The only way our company can combat Continental Can Co's guarantees is to also secure extension agreements". A Corporate Giant requires a few hundred Hamilton workers to throw away 2 years because "It is critical to the future of our company."

"*No take-aways*", – that statement is not even a questionable one because in our current contract we "roll-in" our C.O.L.A. every 3 months. If we were to accept their extension it would only be "rolled-in" every 12 months (March 1985 and March 1986).

If by January of 1985 the C.O.L.A. for the previous three quarters stood at \$1.00 per hour, a three week vacation would cost you \$120.00 worse still, a January – February – March E.E.P. would cost \$440.00, – is that not a “take-away”?

Concessions need not be “take-aways” though, concessions means to concede or to *give*, and contract time is one time when it is definitely “not better to give than receive”.

Two years with no contract improvements is two years too long. What will our O.H.I.P. cost in 1986? If your sick benefit is not sufficient now, what will it be like in 1986? These, and many other issues, can only be dealt with in 1984 when (the bargaining can be collective and not one sided)[sic]. The company’s position has already been made clear when they said that “There can be no movement in any other area”.

So the next time you are told it would be beneficial for your union to sit down and meet with the company, ask yourself (TO WHOSE BENEFIT?).

Your union representatives are working for your benefit and with your continuing support will secure an agreement with this company at the right time, and that time is not now.

Yours Fraternally,

The Executive – Local 354]

21. The Employer has consistently recognized Local 354’s right to represent the bargaining unit employees as their exclusive bargaining agent.

5. In addition to receiving that agreed statement of facts, the Board also heard the testimony of Donald Stewart (the aforementioned Hamilton Plant Manager) and Douglas Crosbie, the Superintendent of Processing at the Hamilton Plant. The complainant was also afforded an opportunity to call evidence (in chief adverse factors described above have resulted in layoffs and substantially reduced operations at that plant and at oer to the supervisory staff at the Hamilton plant. That memo pertained to the first day of hearing before the Board, certain settlement proposals by Local 354, and various other matters which are not relevant to the adjudication of the present complaint.

6. The respondent employs approximately 500 bargaining unit employees at the Hamilton plant where it manufactures components of cans. However, “near cutthroat” competition and the other adverse factors described above have resulted in layoffs and substantially reduced operations at that plant and at other plants operated by the respondent. It is clear from the evidence of Mr. Stewart that the events outlined in paragraphs 4, 5, and 10 of the agreed statement of facts were “fairly widely known” by supervisors and bargaining unit employees at the Hamilton plant. When employees became aware that “extension agreements” had been signed and approved by locals 353 and 535, some of them began to ask their supervisors

about those matters and about “what was going on with Local 354”. Those inquiries, coupled no doubt with his frustration concerning Local 354’s refusal to meet with management to discuss an extension agreement, prompted Mr. Pocock to write to employees on July 5, 1983 (as described in paragraph 13 of the agreed statement of facts).

7. As indicated in paragraph 16 of the agreed statement of facts, Mr. Pocock and various other members of management toured the Hamilton plant on July 13, 1983 and spoke with various employees on a random basis. It was Mr. Stewart’s uncontradicted evidence that it was not unusual for members of management to walk through the plant and talk to employees from time to time. On the day in question Mr. Pocock “paired off” with Mr. Crosbie and spoke briefly with approximately twenty bargaining unit employees (including Local 354’s Chief Steward and a member of its Executive) individually or in small groups. Normal production continued during those brief and informal discussions. Mr. Pocock asked the employees with whom he spoke if they had received his letter (of July 5, 1983) and what their thoughts were on his letter. In the absence of any evidence to the contrary, we accept Mr. Crosbie’s candid and credible testimony which indicates that Mr. Pocock was merely passing on information and responding to employees’ questions, and was not intimidating, coercing, or unduly influencing employees, nor making any threats or promises to them. The same is true of Mr. Carlisle, who walked through the machine shop and coating area with Mr. Stewart and spoke with various employees, including W. Moore and S. Mutton, members of the Executive of Local 354 who were present at the hearing of this matter but were not called to testify. Thus, Mr. Stewart’s candid and credible testimony, which was not subjected to any cross-examination by the complainant, is also entirely uncontradicted. He told the Board that some employees asked questions about matters such as hay “asked some employees if they had received a copy of Mr. Pocock’s letter of July 5” and “attempted to respond tthe July 5 letter or its contents. Mr. Tucker also toured the plant that day, accompanied by Ron Eyford, the Supervisor of Quality Engineering at the Hamilton plant. Although no direct evidence was adduced before the Board concerning what Messrs. Tucker and Eyford said to the employees with whom they spoke, as indicated in paragraph 16 of the agreed statement of facts the parties are in agreement that members of management who toured the plant that day “asked some employees if they had received a copy of Mr. Pocock’s letter of July 5” and “attempted to respond to questions that were put to them”. Having regard to that agreement, and in the absence of any evidence to the contrary, it is reasonable to infer in the circumstances of this case that Messrs. Tucker’s and Eyford’s communications with employees were similar to those described above in relation to Messrs. Pocock, Crosbie, Carlisle and Stewart.

8. The evidence also establishes that by means of letters, notices, and newsletters, management has communicated directly with bargaining unit employees a number of times in the past with respect to various matters including layoffs, reductions in business activities, the need to maintain the Company’s competitive position, the highlights of an economic offer made by the Company to Local 354 during negotiations for a collective agreement, and the effect of technological and other changes on the Company’s competitive position. Local 354 has not grieved, filed a complaint under the *Labour Relations Act*, or otherwise challenged the propriety of any of those communications (although it did post a notice advising employees not to answer any questions in an employee opinion survey which management planned to have mailed directly to employees by an independent company with expertise in that area).

9. As indicated above, the complainant alleges that the respondent has contravened sections 64 and 67(1) of the Act. Section 67(1) provides:

No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

As noted by the Board in *A. N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393, at paragraph 17, the scheme of the *Labour Relations Act* contemplates that the acquisition of bargaining rights by a union carries with it an exclusive license to bargain on behalf of the employees in its bargaining unit. That exclusivity of the union's bargaining rights is expressly protected by section 67(1) which prohibits employers from bargaining directly with employees represented by a union. It is apparent from the facts set forth above that for over twenty-five years the employer has recognized the complainant as the exclusive bargaining agent for the (bargaining unit) employees at its Hamilton plant. It is also apparent that, far from organization shall participate in or interfere with the formation, selection or administration of a trade union, has been attempting to arrange a meeting with the Executive of Local 354, as the employees' duly recognized bargaining agent, to discuss an extension to the collective agreement currently in force. Thus, the substance of those direct communications clearly indicates that at all material times it was the intention of the respondent to continue to recognize the complainant as the exclusive bargaining agent for its Hamilton plant employees. Accordingly, we are satisfied that neither the respondent, nor any person (or organization) acting on behalf of the respondent, has bargained with (or entered into a collective agreement with) any person or trade union other than the complainant in respect of the Hamilton plant bargaining unit. Accordingly, we find that there is no merit in the complainant's allegation that the respondent has contravened section 67(1) of the Act.

10. The complainant also relies upon section 64 of the Act, which provides:

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

That provision proscribes (among other things) employer interference with the representation of employees by a trade union, but expressly preserves an employer's "freedom to express his views", subject to the important proviso that "he does not use coercion, intimidation, threats, promises or undue influence." The Board has cautioned employers, through its jurisprudence, that they must be circumspect when communicating directly with employees on collective bargaining matters, especially when those communications occur during the course of negotiations. See, for example, *A.N. Shaw Restoration Ltd.*, *supra*, at paragraph 18, in which the Board wrote:

The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 [now section 64] of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not “deprive an employer or his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence”. Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from protected area, such communications can be characterized as a violation of section 59 [now section 67] of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent.

See also, generally, *Toronto General Hospital*, [1983] OLRB Rep. Apr. 607; *Canada Cement Lafarge Ltd.*, [1982] OLRB Rep. Nov. 1583; *Globe Spring & Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303; *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *The Citizen*, [1979] OLRB Rep. Mar. 177; and *Greb Industries Limited*, [1978] OLRB Rep. Oct. 89.

11. Having carefully reviewed Mr. Pocock’s letters of July 5 and July 15, 1983, in the light of the pertinent jurisprudence, we have concluded that, in the circumstances of this case, the respondent did not contravene section 64 by sending them to bargaining unit employees. We do not view the contents of those letters as constituting coercion, intimidation, threats, promises or undue influence. Moreover, the communications are similar in substance to various other written communications which the respondent has posted, mailed, or delivered to bargaining unit employees over the years without any objection from the complainant. For the foregoing reasons, we are satisfied that those letters fall within the ambit of the freedom of expression guaranteed by section 64 of the Act, and that the respondent did not contravene the Act by sending them to bargaining unit employees in the circumstances of this case.

12. The fact that senior members of management, including the respondent’s Chief Executive Officer, attended at the plant on July 13, 1983 and spoke with a number of bargaining unit employees has given us some concern. As indicated above, although an employer is free to express his views, he cannot use coercion, intimidation, threats, promises, or undue influence. With respect to the latter term, the Board wrote as follows in *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60, at paragraph 35:

In *Words and Phrases Legally Defined* (London, 1970) undue influence is defined in part as:

“the unconscientious use by one person of power possessed by him over another to induce the other to enter into a contract.”

In the context of *The Labour Relations* Pocock and the other members of management who spoke with employees that day. This is not a case involving a union in order to induce them to forego their rights in relation to a union. An employer exerts undue influence on its employees, and thereby breaches the Act, when it takes unfair advantage of its position and authority in an attempt to sway the will of the employees. The line between legitimate employer expression and undue influence is not easy to draw in the abstract, and can only be assessed on a case by case basis.

Having carefully considered the evidence and the facts set forth in the parties' agreed statement, we have concluded that, in the circumstances of this case, the respondent did not contravene section 64 through the actions of Mr. Pocock and the other members of management who spoke with employees that day. This is not a case involving a union organizational campaign or a newly established collective bargaining relationship in which employees are likely to be particularly sensitive to any utterances by management. The conversations in question were relatively informal and did not involve mass “captive audience” meetings. Moreover, as indicated above, it was not unusual for members of management to tour the plant and speak with employees. Most importantly, the content of the communications was completely innocuous, limited as it was to inquiries as to whether employees had received Mr. Pocock's letter of July 5 and to unobjectionable responses to employee questions. Thus, while this decision is not to be construed as in any way indicating that direct personal communication by senior members of management with bargaining unit employees will not be subjected to close scrutiny by this Board, or that further such communications concerning the complainant's refusal to meet with the respondent with respect to the extension agreement desired by the Company would not cross the boundary between freedom of expression and undue influence, in the circumstances of the present case we are satisfied that the respondent did not contravene section 64 or any other provision of the Act in that regard. Although there has been some equivocation in the Board's jurisprudence concerning whether or not anti-union motivation is an essential element of section 64, in *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316, the Board, after thoroughly reviewing the pertinent jurisprudence and policy considerations, indicated that in appropriate cases where there is a clear imbalance of interests in favour of protected activity, the Board will be prepared to adopt a “non-motive approach to section 64”, such as in instances of clear mistake or discipline clearly out of all proportion to the misconduct in issue. The present case involves neither anti-union motive nor a clear imbalance of interests in favour of protected activity. However, even if it were to be assumed that this is an appropriate case in which to adopt a non-motive approach in respect of section 64, the complainant's case would not succeed since it has not established that the respondent's impugned actions have in any way interfered with its administration or representation of bargaining unit employees, or that it has in any other way (contemplated by section 64) been adversely affected. In the present case we are satisfied that the respondent did not contravene section 64 or any other provision of the Act eminently appropriate for discussion between such parties.

13. For the foregoing reasons, this complaint meeting with the respondent. Moreover, even if the communications had resulted in such meeting, it would be difficult to characterize that result as falling within the ambit of section 64 as it would merely represent a meeting of the Company with its employees' bargaining agent for the purpose of discussing the possible extension of their collective agreement in the light of the Company's current economic and competitive position, a matter which is eminently appropriate for discussion between such parties.

13. For the foregoing reasons, this complaint is dismissed.

1287-83-U International Union of Operating Engineers, Local 793, Complainant, v. Campbell Red Lake Mines Limited, Respondent

Change in Working Conditions – Discharge for Union Activity – Employee discharged for bootlegging – Irrespective of fairness Board satisfied no anti-union animus involved – Absence of specific company rule prohibiting bootlegging immaterial – Freeze provisions not applicable

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members I. Stamp and W. F. Rutherford.

APPEARANCES: *B. Fishbein, D. Redshaw and W. Yallop for the complainant; R. J. Drmaj and Gary Alexa for the respondent.*

DECISION OF THE BOARD; October 21, 1983

1. This is a complaint under section 89 of the *Labour Relations Act*. The complainant alleges that the grievor, Bill Yallop, has been dealt with contrary to sections 64, 66, 70 and 79 of the Act. The complainant contends that Mr. Yallop was discharged because of his trade union activities, and further, that the manner of his discharge breaches the "statutory freeze" imposed by section 79 of the Act. The respondent employer asserts that Mr. Yallop was expelled from its mining camp and his employment was terminated because he was "bootlegging". The respondent maintains that the grievor's termination had nothing whatsoever to do with trade union activity. The provisions of the Act upon which the complainant relies are as follows:

[Section 64 66(a)(c), 70, and 79(2) omitted.]

2. The respondent employer is a mining company engaged in a project at Detour Lake in the District of Cochrane. The only access to the project is by air. Employees reside on the site in trailers maintained by the respondent, and are flown in and out of Detour Lake at the end of their shifts in planes chartered by the respondent. Employees work on a rotating basis with a number of days at Detour Lake followed by a number of days off.

3. In recent months Detour Lake has become the focus of a considerable amount of trade union activity. The United Steelworkers of America applied for certification on April

22. 1983, and that application was followed by interventions and/or separate applications by the International Union of Operating Engineers, Local 793, the complainant herein, the International Brotherhood of Electrical Workers, and the Mine, Mill and Smelter Workers Union, Local 598. Eventually, the Board determined that these various certification applications should be determined by recourse to a representation vote so that the employees would be given the opportunity to determine which if any of these unions they wished to represent them. As it turned out, two votes were necessary – one with the Steelworkers, the Operating Engineers, and a “no union” option on the ballot, and a second “runoff” vote between the Steelworkers and the Operating Engineers. The Operating Engineers were ultimately successful and a certificate was issued to that union; however, in the meantime, there was a considerable amount of activity for or against each of the options available to the employees. The respondent employer agreed that the representatives of the various union should all have access to the site to put their particular positions, and, in consequence, representatives of one or another of these unions were in regular contact with the employees during their off-hours.

4. Mr. Yallop was a supporter of the Steelworkers’ union and no doubt expressed that support during the campaign. Apparently there was quite an active debate about the pros and cons of the various unions involved. Mr. Yallop participated in that debate, but there is little to indicate that he was unusually vocal or that his views would have come to the attention of his employer. He did not, for example, solicit membership cards, nor can he be regarded as a rank and file organizer or key supporter of the Steelworkers’ union. The evidence indicates that Mr. Yallop’s contact with union representatives was related more to his active social life than any particular ideological commitment to trade unions.

5. In recent months, Mr. Yallop has lived in trailer no. 6, which was described as a “live-wire” trailer, where the residents liked to enjoy themselves. Often there were parties three or four nights a week, attracting residents from other trailers who came in search of a good time. It was logical for union representatives to visit places where employees congregated, and the evidence establishes that the representatives of the various unions were frequent visitors to trailer no. 6. And, of course, all of this partying required adequate stocks of liquid refreshment.

6. For some time it was possible to purchase beer from the camp commissary, but this service was recently discontinued. This posed a problem for the residents of trailer no. 6. Flights in and out of Detour Lake had a baggage limit of forty pounds per passenger. This effectively prevented employees from bringing in more than one case of beer per week. This was insufficient to fuel the fun of the garrulous group in trailer no. 6.

7. Mr. Yallop gave his evidence under the protections of the *Ontario Evidence Act* and the *Canada Evidence Act*. He testified that in order to ensure an adequate supply of beer, he and Dave Martin, another trailer 6 resident, canvassed employees in camp to identify those who did not drink beer and thus might not be using their full baggage limit. Permission was then sought and granted to use the names of these employees for cases of beer which would be flown in ostensibly as their own, but in fact destined for the thirsty residents of trailer 6. Martin would purchase the beer in Timmins, where he lived, then he and Yallop would arrange for its delivery to Detour Lake. Had this been the extent of Mr. Yallop’s activities, he probably would not have run into difficulties with his employer. However, he also began to sell beer at twenty-five dollars a case, and seventy-five cents per single pint. This practice came to the attention of his employer, and ultimately resulted in his expulsion from the camp.

8. Ken Baker, the superintendent of camp services, had heard rumours that there was bootlegging going on in the camp, but he did not initially know who was involved. However, in a casual conversation on or about August 12, 1983, he was advised by John Jones, the warehouse supervisor, that beer could be purchased freely from Mr. Yallop. Baker was skeptical of Jones' assertion that even a supervisor could purchase beer in this way and he decided to find out.

9. On instructions, Jones went to Mr. Yallop's trailer the following evening. He was accompanied by Tom Foster, a security officer, who witnessed the transaction. Jones approached Mr. Yallop and purchased a case of beer at a cost of twenty-five dollars. This was duly reported to Baker and eventually resulted in the issuance of the following memo dated August 26, 1983 and signed by B. E. Bradford, the maintenance superintendent:

We know that you have been selling alcohol for a profit and possibly even trafficking in drugs for some time on the property.

Several of our employees have brought this to our attention, and presently, there are some who are prepared to testify, if necessary, to this effect.

We are, therefore, permanently suspending your camp privileges as of shift end on August 26, 1983. After this time, you will no longer be entitled to use any of the existing camp facilities, nor do we desire your presence on the property prior to or after shift end. If found on the property beyond normal shift hours, you will be considered trespassing.

Given the remote location, the termination of camp privileges was tantamount to a discharge.

10. Ken Baker testified that he was concerned about the grievor's bootlegging activities but chose not to act immediately. Jones had expressed some reluctance to identify himself as an informant, given his first line supervisory position, so Baker decided to monitor the situation to see if there was a way to accumulate sufficient evidence against Mr. Yallop without implicating Jones. Baker discussed the matter with Barry Bradford, the maintenance superintendent, and Gary Alexa, the human resources superintendent, and it was determined that they should monitor the situation until after August 24th, when Yallop was due to return to the camp after his days off and Gary Alexa was expected to be on the site. On the morning of August 25th, Baker was informed by Jim Kershaw, who is responsible for flight details, that he (Kershaw) had observed Yallop and Martin loading ten cases of beer into a company vehicle. The following morning Mr. Yallop was confronted by Baker and Bradford and advised of his termination which was subsequently confirmed by the above-noted memo. Baker testified that he thought the matter was serious and that Mr. Yallop's termination would have the desired deterrent effect. He told the Board that he made no particular effort to investigate further, and did not then know of the extent of Martin's involvement in the actual sale of alcoholic beverages.

11. The complainant admits that he was selling beer on occasion, but maintains that he did not realize that it was wrong to do so. In his submission, none of the camp rules expressly prohibited this activity, nor had there been any company notices, meetings, or warnings about it. The evidence indicates that "borrowing" cases of beer (which were later replaced) was

quite common on the site and, according to Mr. Yallop, the sale of beer was not uncommon among the employees. Since there is no indication or allegation that this off-duty activity had any detrimental impact on the company's operations or the orderly running of the campsite, it is asserted that the company's response was unfair and unduly harsh. The complainant argues that, in the circumstances, the Board should infer that the sale of beer was not the "real reason" for Mr. Yallop's termination. In the complainant's submission the abrupt and selective discharge must have been motivated, at least in part, by Mr. Yallop's association with various trade union representatives.

12. We do not accept the complainant's contentions. As the Board observed during the hearing, the issue which we must determine is whether Mr. Yallop's termination was contrary to the *Labour Relations Act* – not whether in some objective sense it could be considered to be "unfair". Of course, in appropriate cases, employer conduct which is precipitous, arbitrary, unduly harsh, or patently unfair, may lead to an inference of anti-union animus. But this is not one of them. Having heard and carefully considered the evidence of the employer witnesses, we are satisfied that Mr. Yallop's bootlegging activities were the real and only reason for the termination of his employment. Whether that termination was just or fair is not for us to determine. There is no basis for the allegation that there has been a breach of sections 64, 66, or 70 of the Act.

13. Has there been a contravention of the statutory freeze? The complainant argues that section 79 expressly prohibits any alteration in, *inter alia*, employee "privileges"; yet, the complainant asserts, that is precisely what the employer has purported to do. The complainant notes that no one else has ever had his camp privileges revoked and argues that, in essence, the employer is trying to introduce a new form of disciplinary response to employee misconduct. In the complainant's submission, the employer is prohibited from doing so without its consent. Counsel concedes, however, that this argument would not be available if instead of adopting the euphemism "suspending your camp privileges", the company had simply told the grievor that he was being discharged – as, in effect, he was.

14. We do not agree that section 79 has any application in the circumstances of this case. The "privilege" to remain on the site was never unequivocal or unqualified. It was inextricably intertwined with Mr. Yallop's employment relationship and contingent upon both a continuation of that relationship and adherence to company and camp rules. Such rules were posted in each trailer and a perusal of them (see exhibit #2) indicates a number of forms of misconduct which are "strictly forbidden" or "will not be tolerated" or will lead to expulsion. It is noted, for example, that "anyone found smoking in bed will be expelled", that "anyone found stealing on the site will be expelled immediately", that "tampering with fire equipment and/or setting off fire alarms is cause for expulsion from camp", and that the "use of profane and abusive language directed by camp residents at members of the security or administrative staff may be cause for expulsion from camp". It is clear, therefore, that a person is entitled to remain in camp only so long as he is an employee and that, while in camp, he must conform to the employer's norms of behaviour. We do not think an employer is prohibited from responding to illegal conduct simply because its published rules do not contain a laundry list of the various forms of misconduct in which an employee may be engaged. We do not think the employer needs an express rule to prohibit bootlegging, nor does it assist the complainant to contend, as it does, that no one has ever been caught or penalized for bootlegging before. Despite the forceful argument of counsel for the complainant, we do not think the legality of the company's actions in terminating the grievor's employment should

turn upon whether it said to him "you're fired, leave the camp" or "we're suspending your camp privileges and your employment will be terminated".

15. For the foregoing reasons, therefore, this complaint is dismissed.

DECISION OF BOARD MEMBER W. F. RUTHERFORD;

1. I agree that this complaint must be dismissed. Mr. Yallop was not discharged for trade union activity. He was fired for bootlegging and I do not think that discharge was contrary to the *Labour Relations Act*. I wish to make it clear, however, that, in my view, it was grossly unfair, totally unnecessary, and rather surprising from a sophisticated employer embarking upon a brand new collective bargaining relationship.

2. Mr. Yallop's offence had nothing to do with his job, nor is there any evidence that the sale of a few extra cases of beer (i.e., what the residents of trailer 6 did not consume themselves) had any effect on the company or its operations. It is clear that Mr. Yallop did not think he was doing anything wrong – whatever might be the liquor licencing laws in this province – and no one so much as warned him about it. Why else would he quite openly sell a case of beer to a foreman? Tom Foster, the security officer who was sent to witness "the crime", testified that only a week before he had "borrowed" a case of beer from the grievor and paid him back the following Monday when his boss brought in an extra case of beer using his (the boss') weight allowance; so it is obvious that the company is not concerned about non-drinkers bringing in beer for others.

3. In my view, a simply warning would have been sufficient. To put Mr. Yallop out of his job, with all the associated personal hardship that involves, was completely unjust and totally unnecessary. It may underline why the employees need a trade union to protect them, but I must observe it does seem to be uncharacteristic of what, by all accounts, is a good employer with a professional approach to labour relations. The employer's response to a complicated organizing campaign was restrained, its agreement to allow access was relatively generous, and the campaign was not punctuated by unfair labour practice allegations. For this reason, I am prepared to join my colleagues in concluding that, however unfair or unwise the grievor's discharge may have been, it was not a breach of the *Labour Relations Act*.

4. With these comments then I agree that the complaint must be dismissed.

1165-83-U Raymond Daviau, Complainant, v. United Food & Commercial Workers, Respondent, v. Canadian Dressed Meats Ltd., Intervener

Duty of Fair Representation – Unfair Labour Practice – Whether settlement of grievance short of arbitration constituting breach – Review of extent of union's duty in settling grievances

BEFORE: R. O. MacDowell, Vice-Chairman.

APPEARANCES: Raymond Daviau on his own behalf; Charles Bonello, Victor Camilleri and Frank Gormley for the respondent; Dwight E. Greer, Yvon Breau and B. C. O'Connor for the intervener.

DECISION OF THE BOARD; October 21, 1983

1. Pursuant to section 79 of the Board's Rules of Procedure, the Board directs that Canadian Dressed Meats Ltd. be added to this proceeding as an intervener.

2. This is a complaint filed under section 89 of the *Labour Relations Act* alleging that the respondent trade union has contravened section 68 of the Act. That section reads as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The complainant contends that the respondent union was in breach of its section 68 obligation when it decided to settle his grievance rather than take it to arbitration.

3. A hearing in this matter was conducted in Toronto on October 19, 1983. None of the parties were represented by counsel; however, the complainant, the respondent union, and the intervener employer all called evidence in support of their respective positions. My findings of fact, based upon my assessment of the witnesses' relative credibility, are set out below.

4. The complainant has been employed by the intervener for approximately two years. That employment relationship has not been an entirely satisfactory one. The complainant has been disciplined on several occasions and was not very happy with the work he was doing. Medical problems required a temporary assignment to light duties, and when such duties were no longer available and he was returned to his old job, he frequently found himself in considerable pain. The complainant decided that he should quit his job and seek employment elsewhere.

5. The complainant made no secret of his intention to leave the company's employ. On March 11, 1983, he was called to the office of Bernard O'Connor, the plant manager, for the purpose of discussing his absenteeism. Because the meeting was of a disciplinary char-

acter, the complainant was accompanied by Victor Camilleri, the chief steward of Local 287 – the Local of the respondent union responsible for the plant in which the complainant worked. O'Connor warned the complainant that his attendance would have to improve or his job would be in jeopardy. The complainant replied that the company didn't have to worry about firing him because he was quitting at the end of the month anyway.

6. Sometime between March 11th and March 25th, the complainant had occasion to make similar comments to Charles Bonello, one of the respondent union's business agents. Mr. Daviau came to Bonello's office to discuss his employment difficulties. The complainant indicated that his doctor had advised that his work was jeopardizing his health and that he should consider looking for another job. The complainant was interested in Mr. Bonello's opinion. Mr. Bonello advised that, as the complainant was still young and relatively healthy, it might well be sensible to seek alternative employment rather than risk exacerbating his health problems. Bonello's impression was that the complainant was, in fact, going to quit. As will become evident, there is some difference of opinion about whether he actually did so.

7. The complainant received a notice of layoff on March 20th, and was laid off on Friday, March 25, 1983. He heard nothing further from the company and, in August, learned that an employee junior to him had been recalled. He immediately contacted Charles Bonello to request that Bonello file a grievance on his behalf, however, Bonello advised the complainant to raise the matter first with the company itself, then, if he was not satisfied, to bring his complaint to the attention of the officers of Local 287, who could investigate, and take appropriate action. The complainant's approach to the company did not produce satisfactory results. The company took the position that there was no obligation to recall him, because he had quit.

8. There may have been some confusion in the complainant's mind as to the proper steps to take in filing a grievance. Charles Bonello testified that he spoke to the complainant on the telephone and explained to him that he (Bonello) would have a grievance prepared and that the complainant should visit the union's offices for the purpose of signing it. For his part, the complainant testified that he did call Mr. Bonello to discuss the filing of a grievance but told the Board that (in what he characterized as a "lecture") there was no actual discussion about filing a grievance nor any mention that a grievance would be typed for him which he could sign at the union's offices. I am troubled by this aspect of the complainant's testimony. Not only was Bonello a candid and credible witness, but it seems implausible that the complainant would telephone Bonello about filing a grievance, but that no discussion about the process took place.

9. In any event, after a few days, Bonello decided that the grievance should be filed even though the complainant had not yet signed it. To this end, he gave the completed grievance form to Frank Gormley, the local union president, and instructed him to process the grievance in accordance with the procedures set out in the collective agreement. The grievor first raised his complaint on or about August 14, 1983, the grievance is dated August 19, 1983, and, the evidence establishes that once the grievance procedure was invoked, both company and union officials turned their minds to its resolution.

10. It soon became apparent that the complainant's status and the success of his grievance would turn on a question of fact: whether he had quit his employment, as the company maintained, or, alternatively, whether he had merely expressed an *intention* to quit which was

never acted upon. The complainant told the union, and testified before this Board, that he had never actually quit his employment. He had only indicated that he intended to quit some time in May. He testified that he maintained this intention to quit for a few weeks after his layoff, but then had a change of heart when he realized the difficulties he might face in the job market. He denied ever telling any member of management about a firm decision to leave or a particular date of leaving.

11. The company took precisely the opposite position both to the union during the grievance procedure, and before this Board. Bernard O'Connor testified that he encountered the complainant on the morning of March 21st, shortly after he received his notice of layoff effective the following Friday. According to O'Connor, the grievor said to him, "you didn't have to give me that notice, I'm quitting on Friday, anyway". Since this was similar to what the complainant had said on March 11th, O'Connor thought nothing more about it at the time. Yvon Breau, the complainant's shift supervisor, also testified that when he (Breau) gave the complainant his layoff notice, Mr. Daviau remarked, "it don't matter, because I'm quitting on Friday, anyway". Both Mr. Breau and Mr. O'Connor gave their evidence in a candid and forthright way, and neither were cross-examined by the complainant, although he was invited to do so.

12. Bernard O'Connor also testified about a telephone call which he received from the complainant on or about August 17, 1983. Apparently, the complainant was speaking on the telephone with Frank Gormley when Gormley thought it would be advisable to bring Mr. O'Connor into the conversation. This was done, and the complainant reiterated to O'Connor that, in his view, he had not quit. O'Connor replied, "I'm the guy you told, remember who you're talking to". To this the complainant commented, "just because I told you doesn't make it official", and O'Connor said, "it's official enough for Canadian Dressed Meats". According to O'Connor, the complainant then said, "okay, I quit, but I've changed my mind and I want my job back". The request was rejected.

13. During the grievance procedure, the company fully outlined its case and told the union what its evidence would be, should its officials be called to testify at arbitration – as they eventually were before this Board. In order to put that evidence in perspective, Frank Gormley canvassed the other members of the complainant's shift to see whether any of them had any recollection of what the grievor might have said about his intentions in the week preceding his layoff. Three of those employees indicated that, as far as they knew, the complainant was quitting his employment.

14. The union officials also asked the company about the form of termination notice which had been issued to the complainant. That form indicates that the complainant was on "temporary layoff", and this appeared to be inconsistent with the company's position that he had quit. However, the company explained that the complainant was only one of some seventy individuals who were laid off on March 25th, and that the clerk in the personnel office had simply issued seventy identical separation slips. Given the confusion and turmoil surrounding the layoff of almost a third of the employer's work force, no one paid much attention to the complainant's situation, nor did anyone consider his position until he contacted the company about his recall in mid-August. As far as the company was concerned, he had quit so there was no reason to recall him.

15. Section 68 requires a trade union to act fairly in the handling of employee griev-

ances. But it does *not* require a union to carry any particular grievance through to arbitration simply because an employee demands that it do so. A union is entitled to consider the merits of the grievance, the likelihood of its success, whether the interpretation advanced by the employee is consistent with the actual intention and terms of the parties' collective agreement, and so on. A trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and may have ramifications beyond the individual case, a union is not only entitled to settle grievances, but in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official – especially an elected one – cannot be expected to exhibit the skills or conform to the standard of care of a trained solicitor. Normally an honest disagreement about the merits of a grievance, or an honest mistake will not be considered “arbitrary” conduct so as to constitute a breach of the *Labour Relations Act*.

16. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which the parties seek to resolve their differences, narrow the issues, or, so far as possible, settle the facts. As in the ordinary civil court process, it may be in the interests of both parties to seek a settlement which is more modest than either might have obtained had it been entirely successful before an arbitrator, or even to withdraw in the face of perceived factual or legal difficulties. That is what the grievance procedure is for. Its very purpose is to generate a resolution of disputes short of arbitration. The fact that a case is settled or withdrawn does not, in itself, amount to a breach of the Act.

17. More important, however, is the fact that any particular grievance will inevitably be only one of many which the parties will be required to resolve during the currency of their relationship. It is in this context that the grievance procedure must be viewed. If either party obstinantly adheres to an unreasonable position, or continually presses insupportable claims, the entire settlement process could be undermined, and the parties' long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials spend needless hours litigating ill-founded grievances. A frank interchange between the parties, a full disclosure of the strengths and weaknesses of their respective cases, and an honest assessment of the merits or demerits of a particular grievance, are all important to the development of a sound collective bargaining relationship. It makes no collective bargaining sense to argue that grievances which are likely to fail should be litigated to the end, simply because an individual employee “wants his day in court” – regardless of the expense or the effect on the continuing relationship between the parties. As a matter of good judgment, and in the interests of sound industrial relations, a trade union should make reasonable efforts to settle such grievances early in the process. Where such decision is not so patently unreasonable, implausible, or capricious as to be considered “arbitrary” within the meaning of section 68, this Board does not intervene – even if we might have come to a different conclusion than that reached by the union officials. Finally, in assessing an individual's claim, I do not think there is anything improper if a trade union official takes into account the veracity, reputation, and past performance of the employer officials with which they are dealing. A reputation for flexibility, candor, and credibility, are assets on both sides of the bargaining table, as well as factors to be considered when there are conflicting views about the facts or the truth.

18. What then are the facts in the instant case? The complainant was not recalled and filed a grievance. He believes that his grievance may have merit and has demanded that the union take it to arbitration. In response to the grievance, the union officials considered the

complainant's "side of the story" and, in addition, conducted their own independent investigation. That investigation disclosed that on March 11th, in the presence of Camilleri and O'Connor, the complainant had expressed an intention to quit by the end of the month. The complainant had said much the same thing to Charles Bonello. The complainant's fellow employees on the night shift were of the view that in the week preceding his layoff the complainant had expressed the intention to and had, in fact, "quit". The complainant himself admitted his intention to quit, but said that, following his layoff, he had had a change of heart. Finally, the company officials outlined the testimony which they would give (and subsequently did give before this Board) in support of their view that the complainant had indeed quit as of March 25, 1983, and only later had second thoughts about his situation when he encountered difficulties in finding alternative employment.

19. Bonello knew O'Connor well. He has worked with him for almost twenty-five years and has had dealings at the bargaining table and in the grievance procedure. In Bonello's opinion (and he so testified), O'Connor was always open, honest, straightforward, and not the type of person who would try to deceive him. O'Connor was fair, and, in Bonello's opinion, telling the truth. He would make an entirely believable witness should he be called to testify at an arbitration proceeding. The union concluded on the basis of the evidence before it that the complainant's position was unlikely to be sustained should the case proceed to an arbitrator.

20. There is no basis for any contention that the union has acted "in bad faith", or in a "discriminatory" fashion in respect of the complainant's grievance: nor did the complainant actively press that assertion. Indeed, apart from demanding that his case should proceed to arbitration, the complainant was hard pressed to identify anything "arbitrary" about the way in which the union handled his grievance. It entertained the grievance, carried it through several steps of the grievance procedure, undertook an investigation, and, ultimately made an assessment that the complainant's case would be unsuccessful before an arbitrator. I need not express any final opinion about the relative credibility of the complainant or the employer's witnesses. I conclude that the union's assessment of the situation was a reasonable one in the circumstances, and cannot be considered to be "arbitrary, discriminatory, or taken in bad faith", within the meaning of section 68 of the *Labour Relations Act*.

21. For the foregoing reasons, the complaint is dismissed.

0458-83-U Tom Norton and the Professional and Clerical Workers of Canada, Complainants, v. **The Canadian Union of Operating Engineers and General Workers** and its Local 111 and Robert Whissell, Respondents.

Arbitration – Interference in Trade Unions – Practice and Procedure – Unfair Labour Practice – Collective agreement’s prohibitions against discrimination because of union activity similar to Act’s – Arbitrator finding no anti-union animus – Board deferring to arbitrator’s award – Failure to recognize advocate nominated by individual employee not interference with union

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: *Thomas P. Norton and Frank Reilley for the complainants; Lynn H. Harden, Gordon Searson and Susan Zimmerman for the respondents.*

DECISION OF THE BOARD; October 13, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a violation of sections 64 and 66. Tom Norton was employed as a business representative by Local 111 of the Canadian Union of Operating Engineers and General Workers (the “employer”) from January 1982 to May 1983 when he was discharged. Mr. Norton was represented in his employment relations by the Professional and Clerical Workers of Canada (the “union”).

2. The employer argued that the complaints raised by Mr. Norton have already been disposed of by an arbitrator and that this Board should defer to the arbitral process. In order to respond to this preliminary objection, we will first review both the contentions made before us by Mr. Norton and the matters addressed by the arbitrator.

3. Mr. Norton’s allegations fall into two categories. He alleges he was discriminated against by his employer, contrary to section 66, for enforcing his collective agreement and initiating earlier unfair labour practice proceedings. The alleged discrimination took the form of threats of reprisal and, ultimately, discharge.

4. In addition, the complainant contends the employer contravened section 64 by attempting to prevent Frank Reilley, an employee of the Retail, Wholesale and Department Store Union, from acting as Norton’s representative in the grievance process. Reilley met Norton in the spring of 1983 while both were attending at the Board’s offices, and Norton asked Reilley to represent him. Shortly after this encounter, Robert Whissell saw Reilley’s name on a grievance form relating to the complainant. As president of Local 111, Whissell was Norton’s superior. Robert Whissell then wrote to the International President of the Retail, Wholesale and Department Store Union:

Dear Sir:

I am writing to you in my capacity as President of the “Canadian Union of Operating Engineers and General Workers” Local 111, in the Ottawa area. It has come to my attention recently through the Labour Relations Board that one of your employees, namely Frank Reilly is to represent

one of our employees Thomas Norton at the Labour Board. Thomas Norton works under a collective agreement and belongs to a union "The Professional and Clerical Workers of Canada". It would seem to me the proper procedure to follow here would be to call in a representative from his union to represent him and not a Business Representative from your union. Mr. Norton has entered a section 45 at the Labour Board and he has named Frank Reilly 1061 Merivale Road Suite 6A-B Ottawa Ontario, K1Z 6A9 under the heading of - address of trade union. I would hope Mr. Reilly would be told by his proper boss to look after his own union affairs and stay out of ours.

If more information is required please feel free to call me at home (613) - 820-0902 or at our local office.

A copy of this letter was sent to Reilley and to Norton's union. Norton testified about a subsequent conversation in which Whissell expressed opposition to Reilley, but Whissell denied any such discussion. The employer was later advised by the union, in a letter dated May 30, 1983, that Mr. Reilley had been authorized to represent the complainant. Apparently, the union does not employ its own representatives.

5. The complainant initiated two arbitral proceedings against the employer in the spring of 1983. Mr. Norton's discharge was the subject of one arbitration hearing which consumed six days in June, 1983. The other grievance alleged violations of fourteen provisions of the collective agreement and resulted in three days of hearings in late May and early June. In this proceeding, Mr. Norton alleged violations of Articles 1.01, 14.01 and 14.03 of the contract:

1.01 The employer recognizes the union as the sole collective bargaining agent for all clerks and business representatives in the employ of the employer.

14.01 The Employers agree that there shall be no discrimination by the Employers against any employee, or group of employees because of membership in the Union. Employees shall not be subject to prejudice or discrimination because of presenting grievances for themselves or other employees.

14.03 The Employer shall not discriminate for Union activities.

Both grievances were heard by the same arbitrator who issued two awards in late August, 1983. The arbitrator had this to say about Mr. Norton's dismissal:

His recourse to litigation in face of possible violations of the collective agreement or the Labour Relations Act is almost Pavlovian. He contends that the employer dismissed him partly in reaction to the grievances and unfair labour practice complaints he has lodged. While the executive was not pleased with fairly frequent proceedings initiated by Mr. Norton there is no evidence to indicate that this was a cause for his dismissal. Rather their action seems more to have resulted from a sense of frustration in their dealings with Mr. Norton leading to animosity and antagonism be-

tween them. Mr. Norton is disputatious, over zealous and somewhat arrogant in his assumption of superior credentials in carrying out the affairs of the Local. These qualities were openly resented by members of the executive who being elected by the members believed they should be in control of the Local's business.

Turning from the dismissal to the employer's other dealings with Mr. Norton, the arbitrator again found no anti-union animus:

As far as discrimination in violation of Article 14 is concerned, no evidence was adduced to demonstrate or even indicate that the employer's actions were motivated by Mr. Norton having filed this or any other grievance or by his activities as a member of PCWC.

6. But the arbitrator's response to the suggestion that the employer improperly interfered with Norton's choice of representative is unclear on the face of the award:

There was an exchange of correspondence between the employer, the PCWC and the Retail, Wholesale and Department Store Union in which the employer questioned the propriety of an employee of the RWDSU acting as Mr. Norton's representative at an arbitration between Local 111 and the PCWC. This was satisfactorily resolved between the parties. The employer did recognize at the hearing that the employee is entitled to be represented by someone of his own choice without reference to the wishes or preferences of management. As this incident was settled and there is no evidence of any other alleged violation of clause 1.01 *I cannot find before me a breach of that provision, nor am I prepared to rule on whether the employer was wrong in its initiatives concerning representation of Mr. Norton.*

(emphasis added)

Did the arbitrator find no breach or did he refuse to making a ruling? The answer is not obvious. Mr. Norton testified the parties agreed during the arbitration hearing that this issue would not be addressed, leaving the complainant free to bring the matter to this Board. In the absence of any evidence to the contrary and in the face of an unclear award, we accept Mr. Norton's testimony.

7. The Board's policy on deferral to arbitration was canvassed in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254:

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7. It may be that the Board's approach has been somewhat less refined but the American treatment of deferral issues is not inconsistent with Board jurisprudence. Cases like *Canadian Acme Screw and Gear Limited* (1954), 54 CLLC ¶17,083; *John Inglis Co. Ltd.* (1953), 53 CLLC ¶17,049; *National Showcase Co. Ltd.* (1961), 61 CLLC ¶16,185; *Heist Industrial Services Ltd.* (1963), 63 CLLC ¶16,263; *Wallace Barnes Co. Ltd.* (1961), 61 CLLC ¶16,198 and *Collingwood Shipyards*, [1967] OLRB

Rep. July 376 all approach the deferral doctrine as one that will encourage the practice and procedure of collective bargaining. These cases are also aimed at discouraging dual litigation and forum shopping by encouraging the parties to employ initially the contractual procedures for dispute settlement which they have created. See *Kodak Canada Ltd.*, [1977] OLRB Rep. Feb. 49. But it is also apparent that in those cases the Board acted on the premise that the resolution of the contractual issues was congruent with the resolution of the statutory unfair labour practice issues. See *Imperial Tobacco Products (Ont.) Ltd. et al.*, [1974] OLRB Rep. July 418 at para. 26. This congruence between the contractual dispute and the overlying unfair labour practice complaint is significant in the sense that the Board is able to take the view that the matter is primarily a contractual or factual difference between the parties. See *Corporation of the County of Middlesex*, [1976] OLRB Rep. Aug. 427 at para. 4. However, where key provisions of *The Labour Relations Act* require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process, it becomes more difficult to characterize the complaint as essentially contractual. It is in these situations that the Board has asserted its jurisdiction. The former situation is reflected in *Thomas Built Buses Ltd.*, [1980] OLRB Rep. Feb. 264 and the latter can be seen in *New Gregory House*, [1977] OLRB Rep. Sept. 584. Other circumstances in which the Board has been unwilling to defer to grievance arbitration involve cases where arbitration may have been unavailable to the complainant or where relief in that forum could have been inadequate. See *Wallace Barnes Company Ltd.*, (1961), 61 CLLC ¶16,198 and the general discussion in *Imperial Tobacco Products (Ontario) Limited*, *supra*. Moreover, where the Board defers to the arbitration process it will nevertheless retain jurisdiction as the NLRB in order to insure (a) that the dispute over the meaning of the collective agreement is resolved with reasonable promptness; (b) that the arbitration procedures have been fair; and (c) that the outcome of arbitration is neither repugnant to the purposes of the Act nor remedially inadequate. See *Imperial Tobacco Products (Ontario) Limited*, *supra*, for a full discussion of these subsidiary principles. We are also of the view similar to positions taken in *Banyard* and *Stephenson*, *supra*, that the Board will not defer or will exercise its retained jurisdiction where the grievance or board of arbitration fails to deal directly and explicitly with the unfair labour practice issues.

8. In light of these principles, what in the instant case caused the Board to refuse to defer to grievance arbitration? *The complaint centres on the grievor's union activity and a dismissal but these allegations will not usually, in themselves, be sufficient justification for Board intervention into a collective bargaining relationship or, at least, these matters will not usually constitute a prima facie case for labour board intervention.* Most collective agreements provide for the appointment of union stewards and also provide for their activity within the context of the collective agreement. Disputes over the extent and exercise of these contractual rights are not unusual and will not normally rise to the level of a policy con-

cern transcending the particular collective bargaining relationship. (See *Douglas Aircraft Co. of Canada Ltd. v. McConnell et al.* (1979), 99 D.L.R. (3d) 385; and *Firestone Steel Products of Canada Ltd.*, (1975), 8 L.A.C. (2d) 164 (Brandt).) Moreover, the general requirement found in most collective agreements that discipline and discharge be effected only for just and sufficient cause will normally provide an adequate remedy if the allegation is made out on the evidence. See *Firestone Steel Products of Canada*, *supra*; and *Re Stancor Central* (1970), 22 L.A.C. 184 (Weiler). Indeed, many collective agreements contain a "no discrimination" provision wherein the employer explicitly promises that there will be no discrimination on the basis of union membership. For example, a disciplinary dispute over union activity within the context of a collective bargaining relationship that has existed for twenty or thirty years would seem to be amenable to resolution by the parties themselves by way of their own dispute resolution procedures. Deferral in such circumstances is more consistent with the practice and procedure of collective bargaining.

9. In the instant case, however, we are confronted with a dispute over union activity involving a probationary employee and this dispute arises under a first collective agreement. These features of the case caused the Board to exercise its unfair labour practice jurisdiction. The fact that the complaint arises in a first agreement context raised the question as to whether a remedy limited to reinstatement (if the allegations were proved) would be sufficient. The OLRB has an expansive remedial jurisdiction and most recently has developed a fairly sophisticated array of remedies including the posting of notices for the benefit of bargaining unit employees who may have been collaterally affected by an unfair labour practice directed at a fellow employee. See *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Kodiak Crane Corp.*, Board File 0549-80-U, July 18, 1980, as yet unreported; *Mount Forest Caskets Ltd.*, Board File No. 2117-79-U, June 3, 1980, as yet unreported; *G. W. Martin Lumber Ltd.*, Board File No. 2342-79-U, May 29, 1980, as yet unreported; and *A B C Day Nursery & Kindergarten Ltd.*, [1980] OLRB Rep. Apr. 391. But more importantly, the rights of access of probationary employees to grievance arbitration is the subject of considerable debate in labour relations law and this particular employer was not prepared to agree that no objection in this respect would be raised if the complaint was taken to arbitration. A brief review of the provisions of the instant collective agreement in light of recent case law on the access of probationary employees to arbitration underlines the basis to our concern about the efficacy of grievance arbitration in relation to this complaint.

(emphasis added)

8. Turning to the alleged discrimination against Mr. Norton, we believe deferral to arbitration is the appropriate course. As the collective agreement contains both a "just cause" and a "no discrimination" clause, the contractual protection afforded to the complainant is as broad as that available under section 66 of the *Labour Relations Act*. The case has already proceeded to arbitration and no objection has been taken to the fairness of that hearing. In

these circumstances, another round of adjudication would merely serve to prolong the dispute and to waste resources, both public and private. For these reasons, we defer to the arbitrator's finding that Mr. Norton was not the victim of discrimination motivated by his union activities. In light of this conclusion, the Board's broad remedial mandate cannot be a ground for assuming jurisdiction.

9. The complainant also contended that Robert Whissell's objection to Frank Reilley constituted management interference in the administration of a trade union and thereby violated section 64. The arbitrator did not rule upon the employer's reaction to Norton's choice of representative. Should the Board now decide this issue or should it be remitted to another arbitral proceeding? We have decided to adjudicate this matter for two reasons. First, there is some doubt as to whether the collective agreement offers the same safeguards as section 64 of the Act. Article 1.01 of the contract does recognize the union as sole bargaining agent. But this provision *might* be viewed as a mere declaration of rights that does not prohibit management action. Even if a contractual restraint is imposed, the breadth of the prohibition may not be as comprehensive as the protection afforded by the Act. In contrast to section 64, the agreement makes no reference to employer interference in the administration of a trade union. Secondly, other disagreements between Norton and his employer have already resulted in protracted arbitration hearings. A final disposition of the only outstanding issue is in the interest of all concerned.

10. The complainant contends that Robert Whissell violated section 64 of the Act by interfering with the right of an employee to choose a representative. However, the *Labour Relations Act* confers no such right on an individual. The legislation vests bargaining rights in a trade union and obliges an employer to deal with the union rather than with individual employees. An employer is required by statute to deal with a spokesperson chosen by a bargaining agent – to bargain in good faith and to address grievances. But management need not acknowledge employees or their representatives; indeed, direct dealings with the work force infringe upon a union's exclusive bargaining authority.

11. Employer interference in a union's choice of advocate is prohibited by section 64. But in our view Mr. Whissell did not violate this proscription. The employer was not obliged to deal with Mr. Reilley simply because Mr. Norton enlisted his services. Any such obligation could not arise until Whissell had reasonable grounds to believe that the union had authorized Reilley to act on its behalf. As Reilley worked for another union, his authority to act for the Professional and Clerical Workers of Canada was not obvious. There can be no objection to Mr. Whissell making inquiries; although the wisest course might have been to write to the union, instead of going over Reilley's head to his international president. However, once Reilley's authority was established, Mr. Whissell raised no further objection.

12. The complaint is dismissed.

0247-82-R Operative Plasterers and Cement Masons International Association of the United States and Canada, Local Union No. 124, Ottawa/Hull on behalf of all affiliated bargaining agents of the employee bargaining agency, namely the Operative Plasterers and Cement Masons International Association of the United States and Canada; or Provincial Conference of Ontario of the Operative Plasterers and Cement Masons International Association of the United States and Canada, Applicant, v. **Duron Ottawa Ltd.**, Respondent, v. Labourers' International Union of North America, Local 527, Intervener #1, v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, Intervener #2

Bargaining Unit – Construction Industry – Practice and Procedure – Long-standing Board policy to require displacement applicant to take all employees in incumbent's unit – Policy inappropriate in view of passage of section 144 – Applicant entitled to take cement masons without construction labourers – Jurisdiction claimed in provincial agreement not determinative as to whether employees cement masons or construction labourers

BEFORE: D. E. Franks, Vice-Chairman, and Board Members
W. H. Wightman and H. Kobryn.

APPEARANCES: John Johnson, Maurice Savage and John Marchildon for the applicant; no one appearing for the respondent; M. Zigler and M. Martins for intervener #1; no one appearing for intervener #2.

DECISION OF THE BOARD; October 21, 1983

1. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act*.

2. In this matter, the applicant trade union seeks to represent certain employees already represented by the two interveners in this matter. By a decision dated September 7, 1982 the Board directed the taking of a two-way representation vote in a bargaining unit consisting of all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all cement masons and cement masons' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.

3. In ordering the vote for such a bargaining unit, the Board has departed from a long established policy of this Board in displacement situations. That policy is perhaps best enunciated in the case of *Duron Ontario Limited*, [1976] OLRB Rep. Nov. 737 where, simply put, even in cases involving the construction industry and notwithstanding the Board's recognition of the craft structure of the construction industry, the Board in displacement cases has always determined the bargaining unit as a displacement unit under section 6(1) of the Act, and the

incumbent was required in such displacement applications to take all the employees in the existing bargaining unit.

4. In the *Clarence H. Graham Construction Company Limited* case, [1981] OLRB Rep. Sept. 1195, the Board noted that such a policy concerning construction industry bargaining units was probably in conflict with the policy implicit in section 144(1) of the Act dealing with applications for certification in the construction industry. The *Clarence H. Graham Construction Company Limited* case was not a displacement case. This case, however, is. Indeed, it falls squarely within the principles referred to in the *Duron Ontario Limited* case referred to above. Thus, the question which arises is whether in view of section 144 of the *Labour Relations Act* the applicant in the present case should be required to take a bargaining unit of cement masons and construction labourers. That is, the unit represented by the current incumbent, or whether the applicant can seek to represent a unit only consisting of cement masons. It is clear that the applicant does not seek to represent construction labourers, and is only seeking to represent cement masons. Section 144(1) of the Act reads as follows:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 117 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall *include all employees who would be bound by the provincial agreement* together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

(emphasis added)

It is our view that the bargaining unit sought by the applicant, namely, a bargaining unit of cement masons correctly describes, in generic terms, the employees who would be bound by its provincial agreement. Further, to require the applicant to take construction labourers would in fact require the applicant to assume bargaining rights for employees who would not be bound by its provincial agreement. As the Board noted in the *Clarence H. Graham Construction Company Limited* case, this would lead to the mischief of establishing bargaining rights for trade unions bound by provincial bargaining with respect to employees who would be outside the realm of provincial bargaining. As the Board noted in paragraph 11 of the *Clarence H. Graham Construction Company Limited* case:

“It should be noted that section 131a(1) [now section 144(1)] says ‘shall include all employees who would be bound by a provincial agreement’. Normally this would imply that the Board has the power to include employees other than those covered by the provincial agreement. In the present case, however, this becomes a matter of including in a *provincial* bargaining unit or series of bargaining units employees covered by the

regime of provincial bargaining, together with employees outside the provincial bargaining regime. Clearly, subsection 3 and subsection 5 of section 131a [now section 144] deal with matters relating to employees outside the regime of provincial bargaining and we propose to limit the appropriate unit in this case to only those covered by the regime of provincial bargaining. In so doing we are of the view that this is consistent with the provisions of the Act relating to the provincial bargaining. To certify the applicant in the present case for employees in the industrial, commercial and institutional sector in the construction industry, but outside the scheme of provincial bargaining, would create representation rights for trade unions within that scheme for employees outside the regime of provincial bargaining. Such representation would clearly be disruptive of the overall scheme contemplated in sections 125 [now section 137] to 136 [now section 151].”

We, therefore, are of the view that the appropriate bargaining unit is, as found in our previous decision, described in terms of all cement masons and cement masons’ apprentices.

5. Before leaving the matter of the appropriate bargaining unit, however, it is perhaps necessary to comment on the Board’s decision in *Ninco Construction Limited*, [1982] OLRB Rep. Nov. 1692. In that case, the Board, commenting on the *Clarence H. Graham Construction Company Limited* case, also dealt with the matter of the type of employees affected by this application:

“5. The contention of the applicant is that in the *Clarence H. Graham* case the Board misinterpreted the relevant provisions of the Act and wrongly concluded that it was prohibited from certifying an affiliated bargaining agent for employees falling outside the scope of the relevant designation. Accordingly, contends the applicant, the Board should not follow the reasoning set forth in that case. We incline to the view that section 144 of the Act does not permit an affiliated bargaining agent to apply to represent employees in the ICI sector who are outside the scope of the designation affecting it. However, even assuming that the Act does not actually prohibit such a result, we nevertheless regard the unit being requested here, (namely one which includes employees both within and outside the regime of provincial bargaining such that some but not all of the employees would fall under a provincial agreement) to be disruptive of the scheme of provincial bargaining and not appropriate for collective bargaining. The Board has a broad general authority under section 6(1) of the Act to determine the unit that is appropriate for collective bargaining. In the ICI sector this broad authority is restricted somewhat by section 144. Nothing in section 144, however, mandates that the Board include different crafts or classes of employees within the same bargaining unit or requires that employees within and outside the scheme of provincial bargaining be included in the same unit. Accordingly, even if such a unit is permitted under the Act, nevertheless the Board still retains the authority under section 6(1) to conclude that it is inappropriate. As already indicated, we view the unit being requested in this case as inappropriate. Instead, we regard the appropriate bargaining unit as one

which encompasses only employees covered by the labourers' employee bargaining agency designation and who, accordingly, would fall under the labourers' provincial agreement.

6. At the hearing, counsel for the applicant contended that any bargaining unit fashioned by the Board should expressly include not only construction labourers but also 'all employees engaged in cement finishing, waterproofing or restoration work'. This phrase is utilized in both the labourers' employee bargaining agency designation and the labourers' provincial agreement. Presumably the phrase found its way into the designation because of its use in collective agreements entered into by various Ontario locals of the Labourers' International Union prior to the advent of provincial bargaining. To our knowledge, except for displacement applications where the wording had previously been utilized by the employer and the incumbent union, the Board has never recognized employees engaged in cement finishing, waterproofing or restoration work as being one or more separate trades or classifications of employees for certification purposes. Indeed, the Board's experience is that the types of work involved can, and, have been, performed by members of more than one trade. We are not satisfied on the material before us that the Board should now begin to describe bargaining units in these terms. However, in that on the application date the respondent did have employees engaged in cement finishing work, we think it appropriate to describe the bargaining unit in terms of construction labourers but to specify in a clarity note that employees performing this type of work do come within the scope of the bargaining unit. In that the respondent had no employees engaged in waterproofing or restoration work at the relevant time, we do not feel it appropriate to include a similar clarity note relating to this type of work."

The term used in that decision, namely, "employees engaged in cement finishing, waterproofing or restoration work" includes both cement masons and labourers. That is, it is clearly broader than "cement masons". The point in the present application is that the applicant is entitled by virtue of our interpretation of section 144(1) to represent cement masons and cement masons' apprentices (the term in its designation) and need not take all employees engaged in cement finishing, waterproofing or restoration work.

6. As noted above, the Board ordered the taking of a representation vote for a bargaining unit of cement masons. That vote was taken on October 28, 1982 and all the ballots cast were segregated and none of them were counted. By a subsequent decision dated February 7, 1983 this Board ordered that certain additional people be allowed to cast ballots in this vote, which should also be segregated and not counted. It appears that in the present case, in the taking of the first ballot, that one side or the other challenged virtually all of the ballots cast. Subsequently, in meetings with the Labour Relations Officer, the entitlement to vote with respect to the various employees who cast ballots was sorted out by the parties with the exception of some eight employees. These employees were dealt with in a report by the Labour Relations Officer and the Board has heard the representations of the parties on the report of the Labour Relations Officer.

7. Simply put, the report of the Labour Relations Officer deals with two types of employees. Those employed as waterproofers are Antonio Silva and Richard Bilodeau, and those employed as chippers, Jean Larochelle, Paul Bourgon, Mike Szlauko, Paul Szlauko, Bermain Henri and Saverio Basile. The position taken by the applicant is that these employees were not entitled to vote. The position taken by the interveners is that they were entitled to vote. The grounds for the intervener's position that they are entitled to vote is primarily that they were performing work which falls within the jurisdiction of the applicant trade union and particularly as set out in article 6 of its provincial agreement relating to jurisdiction:

“ARTICLE 6 – JURISDICTION

6.01 Cement Masons

• • • •

All preparatory work on concrete construction to be finished or rubbed, such as cutting of nails, wires, wall ties, etc., patching, brushing, chipping, and bush-hammering, rubbing or grinding if done by machine or carborundum stone of all concrete construction. All glass set in concrete....”

“6.02 Waterproofers

• • • •

(5) All preparation of surfaces for waterproofing.

(6) Asphalt and other bituminous coating hot or cold, including reinforcing membranes and protective coverings or surfaces.

• • • •

(8) Caulking for the purpose of waterproofing and dampproofing.

• • • •

(18) Sand-blasting and acid etching for application of waterproofing and weatherproofing, vapour barriers, membranes, waterproof paints, etc.

(19) Sand-blasting, acid and alkali cleaning of walls as part of restoration and weatherproofing or waterproofing work.

(20) Application or installation of any material for the purpose of waterproofing, weatherproofing, dampproofing or restoration.

(21) Hot or cold joint sealing work.

• • • •

(24) Installation of expansion joint materials for the purpose of waterproofing, etc.”

that is, the chippers fall within the work jurisdiction of cement masons. The waterproofers fall within the work jurisdiction of waterproofers. The position taken by the applicant is fundamentally that these people are not cement masons but are rather construction labourers. The question which it thus falls to this Board to decide is whether the Board will take as determinative of inclusion in a bargaining unit the jurisdiction set out in a provincial agreement. The intervener's position is that such a clause is totally determinative of the issue. The applicant's position is that it is simply one of a number of factors to be looked at.

8. We are of the view that the jurisdiction as claimed in a provincial agreement is only one of a number of factors which should be looked at determining whether employees fall within a particular bargaining unit. This is particularly so in circumstances such as the present case where work of a particular type is in effect done by a mixed crew of employees. That is, people who generically can be described as cement masons and as construction labourers, both of which are in the employ of the same employer. In such circumstances, where two groups fall under two different provincial collective agreements, it is not at all uncommon in the construction industry for both groups to have overlapping claims in the jurisdictional provisions of their collective agreements. These jurisdictional claims in collective agreements are, therefore, at best a factor which may be taken into account in determining whether they fall in one bargaining unit rather than another. They cannot on their own be taken as dispositive of the issue of which collective agreements they fall under. To hold otherwise would be simply to turn a blind eye to the jurisdictional disputes which arise as a common occurrence in the construction industry. Rather, there are other factors which can be taken into account, such as the nature of the work itself, and the assignment by the employer. Clearly, where an employer employs a mixed crew to perform certain work, the employer commonly assigns certain people in a trade to do certain tasks, and people in the other group to do other tasks. In the present case, it is clear that all eight people in dispute were employed by their employer as construction labourers and not as cement masons, and indeed, it is also clear on the report of the Labour Relations Officer, from the nature of the work performed, that they were not performing cement masons' work but were in fact performing construction labourers' work.

9. Counsel for the intervener cited several cases where the work, for instance, of chipping was found to be a cement masons' work. (See *Re Capform* reported as *The Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 124* [1978] OLRB Rep. Apr. 362). That case, however, was a termination case in which the Board was determining whether certain work being performed, was work covered by the bargaining unit in one collective agreement. As we have noted above, we decline to use the collective agreement as the sole test for determining whether the employees in the present case are cement masons as opposed to construction labourers.

10. For the foregoing reasons, therefore, we find that the eight employees dealt with in the report of the Labour Relations Officer were not employees in the bargaining unit and, therefore, not entitled to cast ballots. Accordingly, the Board hereby directs that the ballots cast be counted, having regard to the Board's present ruling and the various agreements of the parties.

1205-83-U Susan E. Ellis, Complainant, v. The United Steelworkers of America, Respondent

Employee – Unfair Labour Practice – Lawyer recognized and treated as within bargaining unit on agreement of all parties – Union continuing to discuss lawyer's work conditions after lawyer renounced union membership – Discussion of terms to be applied to excluded person not illegal – Section 1(3)(a) definition provision and not capable of violation

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *Susan E. Ellis for the complainant; Naomi Duguid and Ann Morrison for the respondent.*

DECISION OF THE BOARD: October 20, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a violation of sections 1(3)(a) and 15.

2. The United Steelworkers of America (the "union") is bargaining agent for employees of the Sudbury Community Legal Clinic (the "employer"). Susan Ellis worked for the employer as a lawyer from July, 1981 to September 1983.

3. In December, 1981, Ms. Ellis entered into the following agreement with the union:

1. In conducting its negotiations as the certified bargaining agent for and on behalf on all employees of the Sudbury Community Legal Clinic, the Union will endeavour to persuade the Subbury Community Legal Clinic to voluntarily recognize Ellis as a member of the bargaining unit at the said Clinic for all usual and lawful purposes as stipulated in the *Labour Relations Act*, R.S.O., 1970, Chapter 232, as amended.

2. In the event the Union succeeds in persuading the said Clinic to recognize Ellis, Ellis will join and maintain her membership in the Union as required by the consitution of the Union and will abide by such conditions for continued employment at the said Clinic as may be negotiated by the Union and the said Clinic.

A collective agreement for the term April, 1981, to March, 1983 was subsequently executed and remains in force by virtue of a bridge clause. Article 3 is pertinent to this dispute:

3.01 The Employer agrees, for the purpose of this Collective Agreement, to voluntarily recognize the two lawyers on existing staff, David Leitch and Susan Ellis. Said recognition shall continue for as long as the Agreements between them and the Union (Appendices C&E) continue.

The effect of this clause shall be that the lawyers shall be treated by the Employer as though they were present of the bargaining unit certified by the Ontario Labour Relations Board.

3.02 The lawyer shall not be disciplined for refusal to carry out an assignment contrary to the Code of Ethics.

3.03 Voluntary recognition shall not be automatically extended to include new lawyers hired by the Employer, but shall depend upon the prior conclusion of an Agreement between the Union and new lawyers.

Negotiations for a new collective agreement commenced in the spring of 1983 and are still underway. On June 1, 1983, Susan Ellis renounced her membership in the union and so advised both the bargaining agent and employer. However, union dues continued to be deducted from her pay check by the employer and to be remitted to the union. In addition, the employer has refused to negotiate with Ms. Ellis concerning her work in the period since the collective agreement expired.

4. Contending that the union has violated sections 1(3)(a) and 15, Ms. Ellis sought an order directing the union to cease negotiations relating to her work as a lawyer. Susan Ellis also asked that the union dues deducted after June 1, 1983 be returned to her.

5. The parties are agreed that during her tenure with the employer, Ms. Ellis fell with section 1(3)(a) of the Act:

1.-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

(a) who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity;

However, section 1(3)(a) is not a section capable of being violated; it is merely a definition. Turning to section 15, we find there is nothing illegal in a union and employer discussing, or even agreeing upon, the terms to be applied to a person excluded from the statutory definition of employee. (Counsel for the union conceded it could not lawfully carry to impasse its demands concerning such a person.) In our own view, no violation of the *Labour Relations Act* has been established.

6. However, we feel bound to observe that the *Labour Relations Act* does *not* prohibit the employer from dealing directly with someone like Susan Ellis who is not an employee under the Act. Nor does the statute bind her to any agreement reached by the union and the employer.

7. The complaint is dismissed.

0870-83-R Local 2228, International Brotherhood of Electrical Workers, Applicant,
v. **Filtran Limited**, Respondent

Bargaining Unit – Practice and Procedure – Representation Vote – Hours of work of homemaker not recorded – Parties agreeing to determine hour by dividing income by minimum wage rate – Taking six week period to coincide with periods of payments – Employee found to be part-timer since worked less than 24 hours in majority of weeks in six week period – Incomplete and ambiguous representations by union not influencing vote – Board not directing new vote

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members W. H. Wightman and F. S. Cooke.

APPEARANCES: *James Shields, John Kearney, Ray Charron, Paul Jollymore and Susan Kearney for the applicant; Lynn H. Harnden and P. W. White for the respondent.*

DECISION OF THE BOARD; October 31, 1983

1. By decision dated August 23, 1983, another panel of this Board directed a representation vote. The ballots of six employees were segregated at the time of the election and have not been counted. Of the ballots that have been counted, fifty-one were cast in favour of the union and forty-six against. The parties now agree that four of these six employees were entitled to vote and one was not.

2. The only person who cast a segregated ballot and remains in dispute is Nellie Garlough. The parties cannot agree whether or not she is a person regularly employed for not more than twenty-four hours per week. The method by which this issue is to be determined was described in *Sydenham District Hospital*, [1967] OLRB Rep. May 135:

6. In order to make this secondary determination, in industries apart from the chain grocery store industry, it is the Board's experience that it would be useful to look at the period of seven weeks immediately preceding the making of an application as being a manageable representative period in the vast majority of cases. Therefore, if such representative period is used and a person was employed for four or more of the seven weeks under consideration for *not* more than 24 hours per week, the Board would then be in a position to find that the person was *regularly* employed for *not* more than 24 hours per week. If, on the other hand, a person was employed for four or more of the seven weeks under consideration for *more* than 24 hours per week, the Board would be able to find that the person properly belongs in the "full-time" bargaining unit. It is, of course, recognized that a person may move from a *full-time* bargaining unit to a *part-time* bargaining unit depending on what period of employment is considered. The fixing of a reasonable firm period to be considered by the Board in making such a determination had the advantage of consistency which would permit the parties to know in advance what persons are to be considered.

That the seven week period may be varied in appropriate circumstances was recognized in *Holiday Inn Yorkdale*, [1967] OLRB Rep. Nov. 709:

5. In resolving the issue of the part time employee the Board in accordance with the guideline adopted in *The Sydenham District Hospital case* (1967) OLRB M.R. May 135 (at p. 137) usually looks to a representative period of seven weeks immediately preceeding the date upon which the application was filed. And once having surveyed the number of hours worked per week over the seven week period the Board makes its finding with respect to the nature of the employee's status. It must be stressed, however, that the seven week period immediately preceeding the application date is only a guideline and not "a hard and fast rule". If that particular period is found to be "unrepresentative" of the nature of employee's status then the Board will simply elect another period of time that is more representative. In short, in instances where within the seven week period an employee is absent from work due to illness, accident, vacation, holiday, a leave of absence, etc. etc. then that particular week can hardly be considered a relevant period with respect to the application of the guideline. In those instances the Board simply will entertain the parties' representations as to what may constitute a more representative period and as a result thereof will make its computation upon being satisfied of a more accurate reflection of the employee's employment status.

3. As Nellie Garlough is a homemaker paid at a piece rate, her hours of work are not recorded. In an attempt to assist the parties to agree upon her status, a Board Officer suggested that her income be divided by the minimum wage to determine how many hours work at that rate of pay would have resulted in the income received. The suggestion was to use the number of hours arrived at in this way to determine her status. As Ms. Garlough is paid biweekly, the formula can only be applied to an even number of weeks. Taking a six week period, the number of hours are as follows:

week 1	20.61
week 2	20.61
week 3	37.695
week 4	37.695
week 5	23.11
week 6	23.11

The number of hours falls below twenty-four in a majority of the weeks in question. Applying the *Sydenham Hospital* test to these figures, one concludes Nellie Garlough is a person regularly employed for not more than twenty-four hours per week.

4. With one important exception, the employer does not challenge this approach. The employer was content to convert income to hours by means of the minimum wage and also agreed to a six week period. However, we were asked to look to the average number of hours per week over the entire six weeks, rather than to time worked in a majority of individual weeks.

5. One reason advanced in support of the employer's position was that the output of

homeworkers is sporadic. Although this observation is true, it is wide of the mark. The variation in hours worked by part-time employees – homeworkers or not – is the rationale for formulating a seven-week rule in the first place. In other words, the very purpose of this rule is to establish a trend in a situation that is constantly changing. To find a pattern, the Board's general practice is to look to the hours worked in four out of seven weeks, rather than a weekly average over seven weeks. The reason for considering the majority of weeks is that this is a better indicia of a pattern than an average which can be badly skewed by one or two extraordinary weeks. Consequently, the sporadic nature of homework is not a sufficient reason for applying an average hours per week approach.

6. The employer's second ground for advancing an average hours approach is that the amount paid to Ms. Garlough for a two week period does not accurately reflect the amount of work performed by her over that time. Ms. Garlough lives eighty kilometres from the plant. Mr. Philip White, the president of Filtran Ltd., testified that shipments of finished products from her home to the plant are intermittent. However, Mr. White could offer no details to elaborate upon this general assertion; in particular, no shipment dates were provided. In these circumstances, we are not prepared to depart from the Board's general practice.

7. Over the six week period preceding the application, Ms. Garlough worked less than twenty-four hours in four weeks – converting income to hours by means of the minimum wage. She is, therefore, not a member of the bargaining unit. As only four segregated ballots were properly cast, the union's five vote margin on the counted ballots is unassailable. In other words, the union won the election.

8. However, we were asked to direct a fresh vote with a new voters' list expanded to include four foremen whom the employer contends are employees within the meaning of section 1(3)(b) of the Act. Prior to the election, the parties agreed that foremen were to be excluded from the bargaining unit and also from the voting constituency. The employer cannot be allowed to renege upon this agreement after losing an election: the danger of gerrymandering is obvious; in addition, overturning a vote drags out the certification process to the detriment of all concerned.

9. Finally, the employer contended that propaganda issued by the union during the late afternoon on the day before the vote invalidated the election. Two statements relating to a deferred profit sharing plan were contested:

It is one in name only – It is a pension plan.

Full vesting occurs only after 5 years (i.e. your guarantee of benefits).

As to the first statement, the employer conceded that benefits are not normally paid until an employee reaches age sixty-five. In addition, a brochure distributed to all employees by management, entitled "Your Deferred Profit Sharing Plan", begins by saying: "This booklet gives the details of a *pension plan* developed especially for Filtran employees" (emphasis added). Nonetheless, Mr. White claimed the union seriously misrepresented the profit sharing aspect of the plan. As to vesting, Mr. White explained that twenty per cent of the employer's contributions vest after one year, forty per cent after two years, and so on, until contributions are fully vested after five years. The union's failure to explain that *partial* vesting occurs *before* five years was attacked as misleading.

10. The Board's approach to campaign propaganda was briefly described in *McMaster University*, [1979] OLRB Rep. July 685:

11. The Board, in general, does not consider that it should monitor campaigns preceding a representation election which are designed to persuade members of the voting constituency to exercise their franchise one way or another. It is fundamental to our society that proponents of varying views will each put forward the most persuasive arguments in favor of their position and that the electorate is competent to evaluate and decide. Despite its general position, the Board does not close its eyes entirely to the conduct of the campaign if, in its judgment the campaign has been so waged by one party to preclude the other party from a meaningful opportunity of reply and thus to impair the employees' freedom of choice and thereby call into question the weight to be accorded to the results. It is not every unanswerable claim which will cause the Board to intervene. *However, in those instances in which a claim is made, which is in fact false and which relates to a significant factor which would be involved in the voter's final evaluation of the issue on which he is voting, and which the other party has not had adequate opportunity to dispute, the Board will act by ordering a new representation vote. See Joseph Gould and Sons Limited, 52 CLLC ¶17,039:*

(emphasis added)

In our view, the representations made by the union are better described as incomplete or ambiguous than as false. As the employees had already received from management a full description of the plan, the union's propaganda is not likely to have influenced their votes. We decline to order another election.

11. A certificate will issue to the applicant.

0754-83-R Hotel Employees Restaurant Employees Union, Local 75, Applicant, v. 470469 Ontario Limited, c.o.b. as **Golden Griddle Restaurant**, Respondent, v. Group of Employees, Objectors

Practice and Procedure – Representation Vote – Parties agreeing to voters' list excluding individual – Person not in list casting segregated ballot – Employer agreeing to count segregated ballot and signing waiver document agreeing on eligibility to vote – Board holding employer to waiver document – Need for finality of waiver document discussed

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members L. C. Collins and J. A. Ronson.

DECISION OF THE BOARD; October 20, 1983

1. By decision dated August 10, 1983, the Board directed a representation vote of all employees of the respondent at its Golden Griddle Restaurant, 45 Carlton Street in the Municipality of Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office staff, *persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period*. The Hotel Employees, Restaurant Employees Union, Local 75 (the "union") won this election. However, 470469 Ontario Limited (the "employer") contends that ballots were cast by four people who were not entitled to vote. The employer asks that the election be set aside and another vote conducted. At a meeting with a Labour Relations Officer, held on August 5th, the parties agreed to a voters' list. The four people in dispute were not included on the list. The parties agreed not to include Paul Michalik and Collin Walker. Irene Gantner and K. Ng were not discussed at this time, apparently because they were not employed until after the application for certification was filed. After the parties signed the list, the following notation was added by the Board:

Any employee whose name does not appear on the voters' list or challenged voter who feels that he or she is entitled to vote should take this matter up with the returning officer during the vote.

The voters' list was subsequently posted at the work place.

(emphasis added)

3. On the day of the election, the four people in question approached the returning officer and asked to cast ballots. The ballots they cast were initially segregated. A subsequent investigation of their work records disclosed that they all worked more than twenty-four hours per week. The parties then executed a waiver document – Delaine Foster, a law student signed it on behalf of the employer – agreeing that the four persons in question were eligible to vote:

WE the undersigned hereby consent to an immediate counting of the ballots cast at the representation vote directed by the Board and held on August 25, 1983.

WE the undersigned hereby agree that the following persons:

Paul Michalik, Collin Walker, Irene Gantner, K. Ng.

are eligible for inclusion in the bargaining unit and that their ballots should be counted;

AND WE hereby waive any objections as to the regularity and sufficiency of the balloting.

At this point, the segregated ballots were mixed with the rest and the vote was counted.

4. Putting the voters' list and waiver document to one side, the parties are now agreed that three of the employees in question were eligible to vote because they were employed for more than 24 hours per week, and that Walker was not entitled to vote because he was a student employed during the school vacation period. Apparently, no one on the day of the vote adverted to even the possibility that Walker might be a student.

5. The employer argues that the voters' list was "frozen" on August 5th and was thereafter subject to alteration only to delete employees who quit or were discharged before the election. In the alternative, counsel suggested that only persons not consciously omitted from the list by agreement of the parties could be added. Finally, and again in the alternative, counsel argued that Walker's vote should be disregarded because he was not a member of the bargaining unit. Counsel for the union contends the Board should not look behind the waiver agreement. Turning to the agreed voters' list, counsel claims that although it is binding upon the parties to it, this list cannot bind the Board or employees.

6. We do not accept the employer's contentions that the voters' list agreed to on August 5th could not be expanded, or alternatively, could not be enlarged by adding persons consciously excluded at the outset. This line of argument ignores the method by which voters were added to the original list on the day of the election – by mutual consent of the parties in the form of the waiver. As a general rule, an agreement between union and employer, made on election day, overrides an earlier agreement between the same two parties.

7. In other words, the August 5th agreement was superceded by the waiver, unless it was defective. As Michalik, Gartner and Ng were entitled to vote, by virtue of being members of the bargaining unit, the waiver was not deficient with respect to them. That leaves Walker who was not a member of the bargaining unit; was the waiver defective insofar as it applied to him?

8. A general policy of enforcing waivers serves the purpose of finality. From the moment a waiver is executed, the parties are assured that the result of the vote will not be overturned. A union that wins an election is quickly granted a certificate and so is able to immediately call management to the bargaining table. In the converse situation, an application for certification is promptly dismissed, freeing an employer to deal directly with the work force. Whatever the outcome, the parties can conduct their affairs accordingly, secure in the knowledge that any expectations or acts of reliance generated by the election will not be rudely unsettled. Finality would be served equally well by enforcing waivers signed either before or after ballots are counted. But only a waiver executed in advance of the count serves another purpose. As the election result is not yet known at this stage – even though educated guesses may sometimes prove to be accurate – there is less incentive, than after the count, to grasp

at straw objections in order to avoid an unfavourable outcome. Indeed, there is always the risk that objecting at this time will negate an election that the objector won. In short, the uncertainty which prevails before ballots are tallied has a sobering influence on those who might otherwise cloak concerns over the outcome in manufactured objections to the propriety of the election.

9. What should be the Board's response to waivers entered into through inadvertence? To set a waiver aside whenever a mistake is made would be to dangerously undercut the objectives identified above. Moreover, some mistakes do not deserve relief. Consider, for example, an employer or a union that – unknown to the other party – errs in calculating the hours worked by an individual, then agrees that this person is eligible to vote as a full-time employee, but after the count discovers the error and objects to the election on this ground. Even though this objection is one of substance – the person concerned is not a member of the bargaining unit – finality ought not to be compromised to rescue a mistaken party from its own carelessness.

10. The case at hand is not exactly the same as in this illustration. In the example, attention was focused, at the time of the agreement, on the precise issue over which the mistake was made. But in the case at hand, the employer considered the hours worked by Walker and not his status as a student. However, the difference between the two situations is only one of degree. Walker's eligibility to vote was put into question, and the employer through inadvertence failed to address an obviously relevant criterion. In these circumstances, we decline to release the employer from its waiver.

11. A certificate will issue to the applicant.

0632-83-U Paul Atkinson and Edelmiro Vidal, Complainants, v. Retail, Wholesale and Department Store Union, Local 414 and **The Great Atlantic and Pacific Company, Limited**, Respondents

Duty of Fair Representation – Unfair Labour Practice – Union’s undertaking to preserve confidentiality of negotiations preventing disclosure of seniority position upon equipment removal – Union agreeing to transfer complainants’ seniority to bottom of mainstream list reasonable in circumstances – Union failure to consult complainants prior to making proposal not breach – Union not required to take individual items back to membership during negotiations – Ratification vote sufficient safeguard

BEFORE: R. D. Howe, Vice-Chairman.

APPEARANCES: J. A. Black, Paul Atkinson and Edelmiro Vidal for the complainants; Stanley Simpson and R. McKay for the respondent trade union; no one appearing for the respondent company.

DECISION OF THE BOARD; October 21, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainants allege that the respondent trade union (hereinafter referred to as the “Union”) has contravened section 68 of the Act.

2. The complainant Edelmiro Vidal commenced employment with the respondent company (hereinafter referred to as the “Company”) in March of 1973 as a Console Operator on the Ordermatic Selecting System (the “Ordermatic machine”), a computerized machine at the Company’s Grocery Distribution Centre in Metropolitan Toronto. The complainant Paul Atkinson commenced employment in the same classification in December of that year. The complainants alternated between the day shift and the night shift, with one of them working days while the other worked nights.

3. At all material times the Union held bargaining rights for the following unit:

all employees employed by the Company in its Grocery, Produce and Frozen Food Distribution Centres at Metropolitan Toronto save and except foremen, supervisors, persons above the rank of foreman and supervisor, salaried office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period (May 1st to September 15th.)

That bargaining unit encompassed not only the Grocery Distribution Centre at which the complainants were employed, but also two other locations in Metropolitan Toronto, namely, the Company’s Produce Distribution Centre and the Company’s Frozen Food Distribution Centre.

4. The complainants were excluded from the bargaining unit until 1979, as they were considered to be either part of management or part of the office staff. However, in 1979 the complainants approached the Union and expressed concern about their lack of job security, which had become apparent to them as a result of the Company’s discharge of three super-

visors in circumstances which the complainants perceived to be quite unfair. As a result of those discharges, the complainants began to worry that the same thing might happen to them unless they had the protection of the Union and its collective agreement. The complainants were also dissatisfied with their rate of pay, due to the fact that they were earning substantially less than bargaining unit employees in less skilled positions. As a result of those discussions, the Union applied for and obtained bargaining rights in respect of the complainants in or about August of 1979.

5. Article III of the respondents' (October 19, 1980 to October 16, 1982) collective agreement provided, in part, as follows:

ARTICLE III – SENIORITY

3.01 An employee will be considered on probation and will not be subject to the seniority provisions of this Agreement, nor shall his name be placed on the seniority list until after he has completed thirty (30) worked days of employment with the Company. Upon completion of such probationary period the employee's name shall be placed on the appropriate seniority list. The dismissal of a probationary employee shall be in writing and a copy given to the Chairman of the Grievance Committee. Such dismissal shall not be subject to a grievance.

3.02 The Company agrees to post in each Distribution Centre quarterly the revised seniority list, with copies to the Union Office and the members of the Grievance Committee.

3.03 Lay-offs, transfers, recalls or the filling of job openings by posting within the bargaining unit will be dealt with on the basis of seniority, provided that the qualifications of the employees concerned are relatively equal with respect to physical fitness, skill and ability to do the work, and in the case of recalls, those concerned are available to do the work.

It is further agreed that for the purpose of the lay-off and recall provisions of this section an employee's entitlement shall not apply to the classification of Stationary Engineer, Mechanic, and Maintenance, such employees having lay-off, recall, and job posting rights solely within their own classifications.

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3.04 A person shall lose all seniority and shall be deemed to have terminated employment with the Company if he:

(a) voluntarily quits;

(b) is discharged for cause and the discharge is not reversed through the Grievance Procedure;

(c) is laid off for a period of nine (9) months;

(d) fails to report for work within seven (7) days after being notified by registered mail (with a copy to the Union Office) by the Company following the lay-off, or fails to advise the Manager, Personnel within five (5) days of his intention to report for work pursuant to the notification unless a medical certificate or proof of inability to communicate is submitted;

(e) fails to return to work at the expiration of a leave of absence without a reason satisfactory to the Company. A medical certificate or proof of inability to communicate will constitute a satisfactory reason;

or

(f) has a continuous unreported absence for two (2) days without permission or without a reason satisfactory to the Company. Proof of illness (Authentic Doctor's Certificate) or proof of inability to communicate shall be considered a satisfactory reason.

• • •

3.10 Seniority in each job classification within the individual Distribution Centres may be exercised for preference of hours as such hours may be scheduled by the Company, provided, however, that the qualifications of the employees concerned are relatively equal with respect to physical fitness and skill and ability to do the work, and further provided that once an employee has exercised his preference, he may not exercise his preference for a period of twelve (12) months dating from his last shift preference. This sub-section shall not apply to Stationary Engineer, Mechanic and Maintenance.

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6. Negotiations between the Union and the Company in respect of the complainants' positions resulted in the following Appendix to that collective agreement:

APPENDIX "C"

With the exception or addition of the matters as set out below, all of the terms and conditions of the Collective Agreement shall apply to the Console Operators on the Ordermatic Selecting System in the Grocery Distribution Centre at Metropolitan Toronto.

1.01 Supervision shall continue to assist on the Ordermatic Selecting System as it has done prior to the execution of this Agreement, except it shall not be used to the extent that it displaces a Console Operator.

1.02 Section 3.01 is amended to provide for a probationary period of sixty (60) worked days of employment with the Company.

1.03 Section 3.03 is amended to provide that for the purpose of the lay-off, recall and job posting provisions of this section, an employee's entitlement shall not apply to the classifications of Console Operator, such employees having lay-off, recall and job posting rights solely within their own classification.

1.04 Section 3.10 to be deleted for the purpose of Appendix "C" and replaced with the following:

Console Operators shall be credited with their full length of service with the Company for vacation and pension purposes, their seniority have the skill and ability for the job concerned.

1.05 Section 9.01 is amended to provide that the Company agrees to pay and the Union agrees to accept for the term of this Agreement, the classifications and hourly rates applicable thereto as set forth hereunder:

	Effective Feb. 16, 1981	Effective Oct. 17, 1981
<hr/>		
General Progression Rates		
Start	\$ 7.46	\$ 7.46
3 months	7.81	7.81
6 months	8.61	8.61
9 months	8.76	8.76
Console Operator	10.41	11.36

NOTE: All new employees will follow the General Progression Rates until they have completed twelve (12) months of active service, at which time they will receive the rate for the appropriate classification.

1.06 Employees who worked in the capacity of Console Operator on December 21, 1979 shall be credited with their complete Company service and with seniority dates of August 15, 1979.

Thus, while the complainants were credited with their full length of service with the Company for vacation and pension purposes, their seniority date for lay-off, recall and job posting purposes was August 15, 1979, that is, the date on which they joined the Union. The rationale for selecting that date was that as the complainants had only been paying Union dues, and had only been included in the bargaining unit, since August 15, 1979, it would not be fair to the other employees in the bargaining unit to place the complainants on the seniority list ahead of them. The complainants requested and obtained a vote on that matter at a Union meeting. However, they accepted as valid the majority vote which denied their request that they be given seniority (for all purposes) from their respective dates of hire. Accordingly, their seniority date for lay-off, recall and job posting purposes was August 15, 1979. Moreover, Section 1.03 expressly provided that the complainants had lay-off, recall and job posting rights, "solely within their own classification" (of Console Operator). Thus, they could neither bump, nor be bumped by, other bargaining unit employees. That special seniority provision, which is similar to the provision applicable to "the classification of Engineer,

Mechanic, and Maintenance” (as set forth in the second paragraph of Section 3.03 of the main body of the collective agreement), was included in Appendix “C” because (in the words of Mr. Atkinson) the complainants “wanted to retain [their] jobs when joining the Union” and wanted to be free of any risk of being bumped by more senior employees. It appears that the clause may also have been included because the Company did not want other employees to be able to bump the complainants in view of the relatively lengthy training period necessary for the efficient operation of the Ordermatic machine. Thus, the complainants had some input concerning the contents of Appendix “C”. Before the Union approached the Company, Union officials met with the complainants to determine what they wanted to be included in the Appendix. Union representatives then met with management to discuss those matters. Their discussions culminated in Appendix “C”, the terms of which were acceptable to the complainants, the Union and the Che Committee was Edward Jenner, who has been an employee of the Company for about twenty-six years, the first twenn the spring of 1982. The Union bargaining committee (also referred to in this decision as the “Committee”) was comprised of Union Business Agent Bill Hughes (who was replaced in September of 1982 by Robert McKay, an experienced Union Business Agent), three representatives from the Grocery Distribution Centre, three representatives from the Produce Distribution Centre, and one representative from the Frozen Food Distribution Centre. The chairman of the Committee was Edward Jenner, who has been an employee of the Company for about twenty-six years, the first twenty of which were spent at the Produce Distribution Centre. Mr. Jenner has worked at the Frozen Food Distribution Centre for last six years. He has considerable experience as a Union official; after a period of service as a steward he was appointed chief steward and has been involved in negotiating the Union’s last five collective agreements with the Company; he has also served as the Vice-Chairman of the A & P unit (which is one of several units represented by Local 414, which has a total membership of approximately 10,000 workers). The Committee members from the Grocery Distribution Centre included John Yuille and Roy McNeill.

8. During the spring and summer of 1982, the committee met approximately once a week to consider and prepare possible amendments to the collective agreement (which was to expire on October 16, 1982). In or about September of that year, the Committee met with bargaining unit employees to obtain their input concerning the proposals that they wished the Union to place before the Company for purposes of collective bargaining. Notices of that meeting were posted on bulletin boards in each of the three distribution centres in accordance with the Union’s normal practice. Mr. Vidal attended that meeting and requested the Committee to include in its proposals an increase for (Ordermatic machine) Console Operators of 10¢ above the general increase to be negotiated, in order to bring the complainants’ rate up to that of a shipper. That proposal was voted on by the membership and accepted for inclusion in the Union’s bargaining demands. Mr. Vidal also requested that the Committee attempt to negotiate a noise premium for Console Operators, but accepted the Union Business Agent’s view that it would be preferable to propose that the Console Operators’ work area be enclosed to reduce the noise level.

9. Negotiations commenced on September 24, 1982. Further negotiation sessions were held on October 13, 14, 20, 21, 29, November 1, 11, 12, December 10, 13, (1982), January 6, 7, 12, 19, 20, 28, and February 1 and 5 (1983). Beginning in mid December the parties were assisted by a conciliation officer, and later by a mediator. Mr. Jenner described the negotiations as “some of the hardest negotiations we’ve been through with the Company”, due primarily to the fact that the Union was “looking for a catch-up” during this first set of ne-

gotiations in which the Company had ever admitted that it was "in the black". He also told the Board that the parties "came real close to a strike". Many of the bargaining meetings were quite lengthy, and following the employees' rejection of the Company's offer on January 15, 1983 (as described in greater detail later in this decision) there was "a thirty-six hour non-stop" negotiation session on January 19 and 20. All of the bargaining was conducted on the understanding that the Union and Company bargaining committees would maintain confidentiality concerning negotiations until such time as the Union bargaining committee was prepared to take a Company proposal to the membership for ratification or rejection.

10. During the course of negotiations management advised the Committee that the Ordermatic machine "would be coming out" during the term of the collective agreement which they were in the process of negotiating, but did not specify a precise time frame for its removal. Management also indicated that they would be using a manual selecting system once the Ordermatic machine had been removed. There had been rumours in the workplace for several years that the Company might remove the Ordermatic machine. However, by late December of 1982 it was common knowledge among employees in the Grocery Distribution Centre that the Ordermatic machine was in fact going to be removed (as representatives of various wrecking companies were attending at the Centre to appraise the scrap value of the machine).

11. Mr. Vidal was not initially troubled by the prospect of the Ordermatic machine's removal since he felt that he would be transferred to another job in accordance with his seniority date of August 15, 1979. Approximately fifty additional bargaining unit employees had been hired by the Company after that date. However, Mr. Vidal began to worry about his job security when, in early or mid December, Roy McNeill, who had never before spoken to him, shouted across the warehouse, "Ed Vidal, just look at Appendix 'C' to see if you have a job." Since Mr. McNeill was a Union steward who was a member of the Committee, that statement led Mr. Vidal to believe that the Committee must have discussed what was going to happen to the Console Operators' jobs when the Ordermatic machine was removed. Accordingly, Mr. Vidal immediately approached John Yuille and asked him if the Committee had been talking about the complainants' jobs. Mr. Yuille replied that he could not say very much about the matter because negotiations were continuing, but added, "Just hang in there." Mr. Vidal took Mr. Yuille's comment to mean that the complainants' jobs were secure. Although Mr. Vidal felt somewhat reassured of his job security as a result of that conversation, he became increasingly annoyed by the fact that Mr. McNeill continued to ask him questions such as if he had a job, if he had gone out looking for a new job, and if he had found a job. Mr. Vidal remained silent in the face of those taunts until Mr. McNeill told him in late December that he knew where Mr. Vidal could get a good job as a dishwasher. On that occasion Mr. Vidal became quite angry, came down from the machine, and warned Mr. McNeill to stop saying those things to him since it was none of his business. An argument ensued in which they "called each other quite a few names". Mr. Vidal then approached a supervisor, explained what had happened, and asked him to tell Mr. McNeill to stop bothering him. Just before the supervisor arrived, Mr. McNeill told Mr. Vidal that he was "only joking". Mr. Vidal replied that he "didn't like that kind of a joke." That incident prompted management to become evident from the fact that he assisted Mr. Vidal in getting his car started later that same day. Although counsel to the breach of confidentiality, Mr. Jenner in turn telephoned Mr. McNeill and warned him not to talk to employees "about things that were going on at the bargaining table". Mr. McNeill had never before been a member of a bargaining committee, but had been advised at the outset of negotiations that strict confidentiality was required. When

he spoke with Mr. Jenner that day, Mr. McNeill assured Mr. Jenner that he would refrain from making any further mention of such matters. That Mr. McNeill bore Mr. Vidal no ill will as a result of that (or any other) incident is evident from the fact that he assisted Mr. Vidal in getting his car started later that same day. Although counsel for the complainants contended that Mr. McNeill's words demonstrated malice on his part against Mr. Vidal, the evidence as a whole indicates that Mr. McNeill's actions were not malicious, but rather were merely rather foolish attempts to "joke around" with Mr. Vidal. There were no further comments by Mr. McNeill to Mr. Vidal after Mr. Jenner rebuked Mr. McNeill for his breach of confidentiality. The day after that incident, the Company's Director of Warehousing approached Mr. Vidal and assured him that no one was going to lose their jobs when the Ordermatic machine was taken out. Mr. Vidal received a similar assurance from the Director of the Grocery Distribution Centre.

12. After Mr. Atkinson became aware that the Ordermatic machine was going to be removed, he approached management to ask what his situation would be when the machine was taken out and was told that there would be a lot of displacement but that everyone would go where their seniority took them. He did not approach anyone from the Union because he did not feel that he was in jeopardy in any way since he expected to "just blend into the [Grocery Distribution Centre] somewhere else". He was aware of the comments which Mr. McNeill had made to Mr. Vidal but was not concerned about them since he felt that Mr. McNeill was just taunting Mr. Vidal. Mr. Atkinson was also aware of the wording of Section 1.03 of Appendix "C" but felt that it did not pertain to the elimination of his job by the removal of the machine. He was of the opinion that since he had been paying dues since 1979, his seniority should date from that time.

13. In early January, the Company gave the Committee a complete package to take to the membership for ratification or rejection. On January 15, 1983 the Union held a meeting at which employees "voted down" the Company's offer. A strike vote was also taken at that meeting by which employees indicated their willingness to engage in a strike if necessary to obtain a more favourable offer from the Company. The complainants attended that meeting along with a number of other bargaining unit employees. All of the members of the Committee were also present at that meeting. No mention was made at that meeting of the forthcoming removal of the Ordermatic machine or of any seniority or other ramifications which that removal might have. The only contract items placed before the employees at the January 15 meeting were those on which the Union had "concrete proposals" from the Company.

14. Prior to January 15, there had been some discussions between the Committee and the Company concerning whether the removal of the Ordermatic machine would result in lay-offs, reclassifications or other changes. Before putting a proposal to the Company, the members of the Committee discussed among themselves the matter of what the complainants' seniority position should be following the removal of the machine. After considerable discussion, a majority of the Committee members voted to propose to the Company that the Console Operators be "taken into the main body of the agreement and given Union seniority as of the date the machine was taken out", on the understanding that they were to continue to be credited with their full length of service with the company for pension and vacation purposes, and that they would not be laid off as a result of the elimination of their classification. That proposal was presented (orally) to the Company prior to January 15, but as of that date the Committee had received no response from the Company concerning that proposal. After negotiations resumed following the employees' rejection of the Company offer, the Union's

proposal concerning the complainants' seniority was further discussed. Management initially rejected that proposal and suggested that the complainants be put into the mainstream with a seniority date of August 15, 1979. The Committee disagreed with that suggestion and reiterated the Union's previous proposal. Ultimately, the Company acceded to that proposal and drafted the following provision to codify the arrangement:

APPENDIX "C" CONSOLE OPERATORS

It is understood that the seniority of the Console Operators for the purpose of the application of Section 3:03 shall be shown on the seniority list as the date that the operation of the Ordermatic Selecting System is discontinued.

15. On February 5, 1983 the Union, which was by that time in a position to legally engage in a strike, held a second ratification meeting. Approximately 200 bargaining unit employees attended that meeting, including 70 or 80 from the Grocery Distribution Centre, the others being employed at the Produce Distribution Centre or the Frozen Food Distribution Centre. The attendance of 200 employees represented a "good turnout", being over three-quarters of the employees in the bargaining unit. As they entered the meeting, employees were handed copies of a five paged document of proposed collective agreement revisions. The complainants were shocked and angered when they discovered the Console Operators seniority provision quoted above. Messrs. Jenner and McKay, as spokesmen for the Committee, reviewed with the employees each of the proposals in the their own classification". He also told them that the only way to bring them into the mainstream was to place the complainants, who were quite upset, demanded to know why their seniority was being "taken away". Mr. Jenner responded on behalf of the Committee by noting that from the time that they joined the Union, the complainants had been in a position of "super-seniority" where "nobody could touch [them]", by virtue of Section 1.03 of Appendix "C", but had no right to bump other employees as the complainants had "lay-off, recall and job posting rights solely within their own classification". He also told them that the only way to bring them into the mainstream was to place them at the bottom of the seniority list because "it wasn't fair to the guys below [the complainants] to be bumped [by them]". Thus Mr. Jenner indicated that the amendment was not taking anything away from the complainants as, under the existing language, they would have no bumping rights when the Ordermatic machine was removed. He also observed that the amendment was actually beneficial to the complainants since it gave them seniority within the mainstream of the bargaining unit as of the date the Ordermatic machine was removed, rather than merely leaving them in a situation in which the Company would "have the option of letting them go when they eliminated the machine." Mr. Jenner also stated that he had spoken about the issue "in a general sort of way" with some of the members of the bargaining unit and that the consensus of opinion favoured the approach which the majority of the Committee had decided to propose, which approach was similar to that adopted by the Union in other somewhat analogous situations in which the Company had closed down part of an operation. The complainants also understood Mr. Jenner to say that the proposal had come from the Company and that the Union had no choice but to accept it since the Company was not prepared to alter it in any way. However, what Mr. Jenner intended and attempted to communicate to the complainants was not that the proposal was something that the Company had originated, but rather that the wording of the proposal was drafted by the Company, was consistent with what the Union wanted, and could not be changed unless the employees rejected the entire package and sent the Committee back to the bargaining table. Although

counsel for the complainants submitted that Mr. Jenner had intentionally misled the complainants concerning that matter, the Board is satisfied that although Mr. Jenner may not have spoken with complete precision, he did not intend to in any way mislead the complainants by his comments which were made in a good faith effort to explain to the complainants the rationale for the proposed amendment. Having regard to all of the circumstances, the Board finds that this breakdown in communication was not a breach of Section 68 of the Act.

16. Mr. Yuille also addressed the issue of the complainants' seniority at that meeting. He confirmed that the Union was not taking anything away from the complainants as they had no seniority for bumping purposes except within their classification as Console Operators. Mr. Yuille later began to speak again by saying, "To be fair ...", but was immediately cut off by Mr. Vidal who snapped, "Don't say anything to me about fairness." After that, Mr. Yuille sat down and did not attempt to say anything further about the matter. Mr. Vidal also caused Mr. Jenner considerable frustration by interrupting him while he was attempting to explain the rationale for the provision in question. Three or four other Union members stood up at the meeting and spoke in favour of the complainants' position that their seniority date should be August 15, 1979 and that it was unfair for their seniority rights to be "taken away" without a vote. However, there were a number of "catcalls" by other members who were anxious to move on to a discussion of the monetary items, including a retroactive pay provision (worth about \$600.00 to each employee) which appeared below the Appendix "C" amendment on page five of the document. After about twenty minutes of discussion concerning the Appendix "C" seniority amendment, Mr. Atkinson exclaimed, "The contract stinks!" He then walked out of the meeting because he was "getting disgruntled" as he felt that he "wasn't getting anywhere with the Committee". The discussion of the matter continued for about five minutes after Mr. Atkinson's departure, and concluded with Mr. Vidal telling the Committee that they had "done a lousy job" for the Console Operators. Mr. Jenner then told the meeting that the provision in question would be voted on as part of the entire package after the remaining parts of the Company's offer had been considered and discussed. Mr. Jenner also explained to the membership that the entire package had been negotiated by the Committee and that the Committee was recommending that it be ratified. About half an hour later, a ratification vote was conducted in which 160 employees voted in favour of ratification of the package, and 38 employees voted against it.

17. In his testimony before the Board, Mr. Jenner reiterated that the special seniority provision contained in Section 1.03 of Appendix "C" gave the complainants the right to retain their jobs in the event that other employees with greater seniority were laid off. He further testified, "It seemed only fair to me that when they had these rights since 1979 that when they came in [to the mainstream] they got seniority rights as of the day they entered." Mr. Jenner also expressed the view that it would not have been in the best interest of the negotiating process for the Committee to have arranged a meeting at which the seniority clause or any other single item could have been discussed in isolation, as that would have been too unwieldy and would have created undue divisiveness within the bargaining unit. He also noted that the Union's proposal was formulated in response to information given to the Committee in confidence by the Company, and suggested that it would have been a breach of that confidentiality to have discussed the matter with the complainants. He further noted that the complainants were not the only persons affected by the decision, since the other fifty workers hireprovision concerning their seniority. At that meeting, Mr. Jenner was offended by the complainants' allegations "instream" with a seniority date of August 15, 1979 would have given

the complainants bumping rights which they had not previously enjoyed in respect of those fifty persons.

18. Following that meeting the complainants attempted to resolve their dissatisfaction with their new seniority date through various internal Union procedures. They attended the regular monthly meeting in March and spoke at length about their dissatisfaction with the new provision concerning their seniority. At that meeting, Mr. Jenner was offended by the complainants' allegations that they had not been properly represented by the Committee. Nevertheless, he outlined the avenues of appeal open to them. The appeal launched by the complainants culminated in the following letter dated June 13, 1983 from Roy Higson, the Local Director of Local 414:

Dear Brother Atkinson and Vidal:

It was a pleasure to meet you both and discuss your problem regarding seniority. I was sorry that we had to meet under those circumstances.

I have reviewed the Union Agreement and have to agree with Brother McKay that the Union Agreement has not been broken and that the Committee were correct in their definition of Appendix "C" regarding the closing of the Ordermatic Selecting System.

The only answer I can give is that this section is reviewed and an amendment submitted at the next negotiations to get the clause re-worded so you receive your seniority back to 1979.

I do not have the authorization to overrule the Negotiation Committee, or the membership who voted on the Agreement.

If you have any further questions, please do not hesitate to ask.

19. The Ordermatic machine was removed from the Grocery Distribution Centre in May of 1983 and the complainants were given (mainstream) bargaining unit seniority as of the date of its removal. Neither of them was laid off since each was given a position as a manual selector on the night shift. However, they told the Board that if their seniority dated from August of 1979 instead of from May of 1983, they would have a better opportunity to bump onto the day shift as they wished to do, instead of working on the night shift.

20. In his thorough submissions, counsel for the complainants argued that the respondent had contravened section 68 of the Act both procedurally and substantively. He attempted to analogize the preparation of the Union's proposal concerning the complainants' seniority to the legislative process, and contended that it should be based upon "full disclosure and informed debate". He also referred the Board to the administrative law jurisprudence concerning the "duty to act fairly", in support of his contention that the Union was required not only to disclose to the complainants that it was planning to "negotiate away their seniority", but also to convene a "special meeting" in order to give them an opportunity to respond to and lobby for a change in the Union's position concerning that issue. (He further submitted that Mr. McNeill's actions reflected malice and that Mr. Jenner had misrepresented the source of the proposal at the February 5, 1983 ratification meeting. However, for the reasons set

forth above, the Board has rejected those submissions.) With respect to the issue of “substantive fairness”, counsel contended that the Union had not demonstrated any “practical justification” for “taking away the complainants’ seniority”, which he suggested was tantamount to confiscation of a property right. Accordingly, he asked the Board to order that the complainants’ seniority be restored. In the alternative, he requested an order directing the Union to hold a meeting at which the membership could vote on the issue of whether or not the complainants’ seniority date should be revised to August 15, 1979. He also requested that costs be awarded to his clients.

21. Counsel for the Union, on the other hand, submitted that his client had not contravened section 68 in any way. He noted that the Union’s undertaking to preserve the confidentiality of negotiations precluded the Committee from contacting the complainants before making a proposal concerning what their seniority position should be after the Ordermatic machine was removed. He further argued that if the Union were required to consult with “special interest groups” or the entire membership each time it tabled or withdrew a proposal at the bargaining table, there would be no end to negotiations. He also emphasized that the Union was negotiating a “package” and that it would be inconsistent with the dynamics of the negotiating process to require a bargaining committee to take individual items back to the membership during the course of negotiations. Counsel further suggested that consultation with the complainants and the (approximately) fifty employees hired after the complainants joined the Union would not in any event have told the Committee members anything that they did not already know. He disputed the complainants’ contention that the Union had “taken away” their seniority rights, and submitted that, having regard to the special protection which the complainants had enjoyed through having “lay-off, recall and job posting rights solely within their classification”, the provision negotiated by the Union in response to the forthcoming elimination of their own classification was fair and justified.

22. The Board has recognized that the “duty of fair representation” has both substantive and procedural elements. For example, in *The Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781, the Board wrote as follows:

65. The duty of fair representation has both substantive and procedural dimensions. In some cases a union’s actions may result in an outcome that is itself arbitrary, discriminatory or in bad faith, even though the procedures by which it creates that result are to all appearances fair and open. The most obvious example of a substantive violation of the duty would be a union voting by a majority of its members to restrict membership or certain rights under a collective agreement to a particular racial group. The fact that it has not been arbitrary or discriminatory in its procedures, and has arrived at its decision by an accepted democratic process involving proper notice, debate and balloting is no answer to a charge that it has nevertheless violated the duty of non-discrimination owed to the minority. That kind of insidious distinction, which for ease of reference may be characterized as substantive discrimination, has been contrary to the duty of fair representation since its earliest judicial expression. (*Steele v. Louisville & N.R.R.*, (1944) 323 U.S. 192)

66. Procedural infringements on the duty of fair representation have more frequently been the basis of complaints under section 68 before this Board

(see, generally, Brown, “The Duty of Fair Representation in Ontario” (1982) 60 Canadian Bar Review 412.) The procedural aspect of the duty requires that decisions adversely affecting the interest of an individual or group of employees be made by a process within the unit that is untainted by ill will, hostility or any other aspect of discrimination, arbitrariness or bad faith. Outcomes which are the fruit of such procedures have consistently been found to be in violation of the duty of fair representation and have given rise to a number of remedial orders under section 89 of the Act. (*Leonard Murphy* [1977] OLRB Rep. Mar. 146; *Great Lakes Forest Product, Ltd.*, [1979] OLRB Rep. July 651; *Toronto East General and Orthopaedic Hospital Inc.*, [1980] OLRB Rep. Apr. 555; *Toronto Hydro Electric System*, [1980] OLRB Rep. Oct. 1561)

23. With respect to the issue of “substantive fairness”, much of the argument presented to the Board by counsel for the complainants proceeded on the assumption that the Union had “taken away” their seniority by negotiating the impugned provision. However, it appears to the Board that a fair reading of the pertinent contractual language does not support that position. Prior to the negotiations in question, the complainants each had a seniority date of August 15, 1979 within the Console Operator classification. However, it is clear from Section 1.03 of the Appendix “C” that they had “lay-off, recall and job posting rights solely within their own classification”. Thus, if the Union had not negotiated them into the main seniority stream, the complainants might well have been in a position where they could have been laid off when the machine was removed, their only lay-off, recall and job posting rights being within that classification. Instead, the Union proposed that they be given other positions in the Grocery Distribution Centre with new (mainstream) seniority dating from the time of removal of the Ordermatic machine. In deciding to adopt that approach, the Committee proceeded by analogy to earlier situations in which part of an operation had been closed, causing employees of the closed portion to be transferred to other parts of the operation. Moreover, even if the complainants were correct in their assumption that Section 1.03 of Appendix “C” would not apply in the event their classification was eliminated, the most that can be said is that in the absence of specific language (such as the impugned provision negotiated by the Union and the Company) the removal of the Ordermatic machine would create a situation in which the complainants’ seniority rights (for bumping purposes), vis-a-vis other employees hired into the main seniority stream after August 15, 1979, would be rather unclear. Thus, it was both reasonable and desirable for the Union and the Company to discuss and decide that matter during negotiations, rather than leaving the matter in an ambiguous state that might later have to be determined through costly, time-consuming and potentially divisive grievance and arbitration proceedings.

24. In *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35, the Board, after carefully considering the pertinent jurisprudence and scholarly writing, concluded that “a union transferring the job opportunities of a minority to a majority must be required to show some objective justification beyond the majority will” since “special considerations attach to any decision by a union that alters or abrogates the job security of employees”. However, the Board added the following caution (at paragraph 37):

The Board must obviously use great care in assessing what is and what is not objective justification for a union’s decision, particularly a decision relating to choices as to the allocation of goods in conditions of scarcity.

In my view it would be clearly inappropriate for the Board to substitute its own view for the union's by simply asking itself whether it would have acted differently. To do that is to substitute one subjective standard for another, and not to consider the issue of objective factors, after considering and balancing all legitimate interests and without regard to extraneous factors. The Board should ask not whether the decision is right or wrong or whether it agrees with it—rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense “reasonable” must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

25. As indicated above, it appears to the Board that the Union did not transfer job security or seniority rights of the complainants to anyone else in the bargaining unit, since the complainants had seniority (for lay-off, recall and job posting purposes) solely within their Console Operator classification. Moreover, in any event, the Board is satisfied that the Union has shown objective justification for the approach which it adopted. The Committee, after considering and balancing the competing interests, decided that it would be unfair to permit the complainants, who had been “bump free” as a result of having seniority for lay-off, recall and job posting purposes solely within their own classification, to enter the seniority mainstream with August 15, 1979 as their seniority date, rather than the date on which they entered that stream. Accordingly, the Committee, after considering all legitimate interests and without regard to extraneous factors, decided that the seniority rights of the fifty employees hired after August 15, 1979 should be preserved unimpaired by the entry of the complainants into the seniority mainstream. That decision, which was ultimately accepted by the Company and ratified by a substantial majority at the February 5, 1983 ratification meeting, was clearly one that could reasonably be made in the circumstances. As stated by the Board in the *City of Thunder Bay* case, *supra*, at pages 808-810:

68. The cases are replete with passages recognizing that in the collective bargaining system trade offs must be made between the competing interests of different groups of employees. The tension as to which employees will get which slice of the wage and benefits pie negotiated with the employer is intrinsic to any union. Perhaps the best judicial recognition of that reality was made in the often quoted statement of the Supreme Court of the United States in *Ford Motor Co. v. Huggman*, [1953] 345 U.S. 330 at 338:

The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents ... Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the

unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

69. The collective bargaining system, predicated as it is on principles of voluntarism and majoritarianism, deems that issues of that kind are best resolved through the internal procedures by which the union determines the will of its members. The fact that an individual or group is not happy with the choice of the majority does not of itself establish a violation of the duty of fair representation. The principles expressed in *Huffman* were recently applied in *Dufferin Aggregates Ltd.*, [1982] OLRB Rep. Jan. 36. In that case a group of junior truckers lost their work in a quarry as the result of the decision of the majority of their bargaining unit in difficult economic times to amend the collective agreement to substitute layoffs by seniority for the previous work sharing arrangement. In finding that the union's decision did not violate the duty of fair representation the Board made the following observations:

Allocating work and wages, whether in scarcity or in plenty, is the central fact in any scheme of collective bargaining. The struggle between union and management over the division of profits in the form of wage and benefits settlements usually gets the bulk of public attention. The less visible question, however, of which employees will work and how much they will get is often no less important. It may generate as much heat inside the union hall as does the confrontation with the employer outside.

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The fact that a union may be required in bargaining to make a hard decision that has a serious economic impact on individuals, up to and including the loss of their jobs, cannot of itself make that decision unlawful. That kind of decision is, moreover, not unusual. In making collective agreements it is practically impossible for the unions to avoid making decisions that benefit one class of employees at the expense of another. For example when a union opts for more wages rather than better pension provisions it benefits its younger members rather than the older ones. Trade-offs of that kind are the everyday stuff of collective bargaining.

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There is nothing inherently unlawful in a union making a decision that favours a group of employees over another. From the earliest decisions interpreting section 68 of the Act the Board has recognized the need for unions to have the latitude to make decisions that may favour certain employees at the expense of others. As the Board put it in *Ford Motor Co. of Canada Ltd.*, [1973] OLRB Rep. Oct. 519, in applying what was then section 60 of the Act, (at pp. 525-26):

In practical terms the relationship between members of the bargaining unit and the trade union is one of majority control. The relationship is not strictly one of contract between employee members of the union and the union, but rather the relationship is such that the system created more closely resembles the Legislative process than a contractual relationship; see Cox, "Rights Under a Collective Agreement" 69 Harv. L. Rev. 601 (1956).

Section 60 of *The Labour Relations Act* seeks to ensure that individual's rights are not abused by the majority of the bargaining unit; it is an attempt to make the union the guarantor or insurer for every situation in which an individual employee is aggrieved at the exclusive bargaining agent has a duty to consider all the separate interests in the performance of its obligations. The duty has been described as the duty of fair representation. The emphasis is on fairness—it is a duty to act fairly in the interests of all members as well as non-members, craft employees as well as industrial employees. It is not a duty which makes the union the guarantor or insurer for every situation in which an individual employee is aggrieved or adversely affected; rather, the statute attempts to have the union consider the position of all groups and to weigh the competing interests of minorities, individuals and other like groups in arriving at its decision.

(See also, generally, *George Lazenkas*, [1983] OLRB Rep. Jan. 72; *Silverwood Dairies*, [1982] OLRB Rep. Aug. 1199; *Sofley Cartage Limited*, [1982] OLRB Rep. May 766; *Royal Ontario Museum*, [1980] OLRB Rep. Jan. 106; and *Clifford Renaud, et al*, [1976] OLRB Rep. Jan. 967.)

26. Accordingly, the Board finds that the complainants have not established a contravention of section 68 of the Act based upon a lack of "substantive fairness".

27. With respect to the procedure adopted by the Union in negotiating and ratifying the provision which gave rise to this case, the judicial authorities concerning the administrative law "duty to act fairly" to which the Board was referred are of little assistance in deciding the present case. That jurisprudence pertains to administrative and executive functions performed by public or quasi-public agencies, rather than to trade union collective bargaining and ratification procedures. In any event, the duty imposed on a trade union is not, strictly speaking, a duty to act "fairly" (although it is often referred to in those terms for ease of reference), but is rather (in Ontario) a statutory duty to refrain from acting "in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit". Notwithstanding counsel for the complainants' able advocacy of his clients' position, the Board agrees with counsel for the respondent that the procedural dimensions of the section 68 duty did not require the Committee to "go to theat the exclusive bargaining agent has a duty to consider all the separate interests in the e Ordermatic machine's removal. Information concerning the Company's plans to remove that machine was given to the Committee in confidence. For the Committee to contact the complainants concerning that matter in December would have breached that confidentiality, which the Union and the Company had determined, not unreasonably, to be facilitative of the negotiating process. Moreover, it would

be incompatible with the dynamics of collective bargaining to require a trade union to consult with "special interest groups" or the general membership each time it felt it to be appropriate to table a new proposal in response to information provided by the employer, or to withdraw an existing proposal (which withdrawal could have as great an impact on the interests of individual employees as the tabling of a new proposal). A bargaining committee is mandated by the membership to meet and bargain with the employer in the best interests of the membership as a whole. Weighing and compromising various competing employee interests is central to the task which a bargaining committee must perform if it is to effectively negotiate with the employer. It is generally neither practicable nor desirable for a bargaining committee to consult the membership (or special interest groups potentially affected) before responding to proposals or information provided by the employer during the course of bargaining. If this Board were to construe section 68 as requiring such consultation, collective bargaining would be unduly prolonged, if not completely stultified. Ratification procedures (which, as in the present case, are generally provided by a trade union's constitution or practice) provide the membership with an opportunity to assess, against their willingness to engage in a strike, the desirability of the package which the bargaining committee has obtained from the employer. Subject to the overriding requirement of their being objective justification for a union decision which alters or abrogates employees' seniority rights, it is eminently appropriate that the items contained in the proposed agreement be voted on by the membership as part of a package, rather than in isolation, as the reality of the collective bargaining process is that items are almost invariably negotiated as part of a package, rather than individually. (It is unnecessary to consider in the present case the procedural requirements, if any, which apply to trade unions that do not conduct ratification votes before entering into collective agreements.)

28. Having regard to all the evidence and the submissions of the parties, the Board is satisfied that the complainants were afforded a full and fair opportunity at the February 5, 1983 ratification meeting, to express their opposition to the provision concerning their seniority, prior to the vote by which the membership ratified the package that had been obtained by the Committee through lengthy and arduous collective bargaining. Under the circumstances, the Board finds that the February 5, 1983 meeting, the opportunities for discussion and debate afforded to the complainants at that meeting, and the ratification vote conducted following that discussion, satisfied the procedural fairness requirements of section 68.

29. For the foregoing reasons, the Board finds that no breach of section 68 has been established in this case. Accordingly, the complaint is hereby dismissed.

1123-83-R The International Association of Machinists and Aerospace Workers, Applicant, v. **Imperial Clevite Canada Inc.** Mechanical Products Division, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Practice and Procedure – Technical employees better educated, better paid and having greater responsibility – Union support among technical employees low – Not reasons to depart from policy of encompassing office, clerical and technical employees in one unit – Not causing Board to direct vote

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *Stephen Krashinsky and Donald R. Bate for the applicant; M. Patrick Moran, Harley Koyl and Allen Grotke for the respondent; Philip B. Morrissey for the group of employees.*

DECISION OF THE BOARD; October 3, 1983

1. This is an application for certification.

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5. The applicant already represents a bargaining unit of the respondent's production employees. By way of this application the applicant is seeking to be certified to also represent the respondent's office, clerical and technical employees. The respondent is in agreement that the unit should encompass its office, clerical and technical staff. However, the group of objecting employees, all of whom are technical employees, contend that the respondent's fourteen or so technical employees have a separate community of interest from the office and clerical staff, and hence should not be included in the same bargaining unit.

6. The Board's long standing general practice has been to group technical employees in the same bargaining unit as office and clerical employees and not to include them in a separate bargaining unit. See, for example, *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379, *Automatic Electric (Canada) Limited* [1969] OLRB Rep. Feb. 1162, and *York University* [1975] OLRB Rep. July 554. This practice is based upon the proposition that a separate unit of technical employees represents an undue fragmentation of bargaining units and is not conducive to stable collective bargaining. See: *The Board of Education for the Borough of North York* [1970] OLRB Rep. Dec. 915.

7. Notwithstanding the Board's general policy with respect to technical employees, counsel for the group of objectors contended that the facts in this case were unique and justified the Board excluding the technical employees from the bargaining unit. The respondent is a manufacturer of powder metal and elastomer components. According to counsel for the objectors, the technical employees analyze the raw material used in the production process, as well as the work in process. These and the various other tasks performed by the technical employees require that they operate very sophisticated equipment. According to counsel, the technical employees divide their time between the production floor and a laboratory or the engineering department, and do not spend their time with the office and clerical staff. All of the technical staff are graduates of either a university or community college course. It was

counsel's position that the technical employees have greater responsibilities than do the office and clerical staff, and that they receive considerably higher rates of pay.

8. We are prepared to accept as correct the factual submissions of counsel for the objectors. We are not satisfied, however, that the Board should depart from its established practice and exclude the technical employees from the bargaining unit. Because of the very nature of their work, technical employees are frequently better educated and have a greater degree of responsibility than do office and clerical staff. They are also generally better paid. Our experience, however, is that the collective bargaining process is flexible enough to allow these differences to be taken into account. Further, we do not believe that either the education levels or the duties of the respondent's technical employees are materially different from those in numerous other cases where technical employees have been included in the same bargaining unit as office and clerical employees. By way of example, in the 1966 *Falconbridge Nickel* case referred to above, the office, clerical and technical unit included individuals with titles such as: junior planning engineer, mine research engineer, mine underground geologist, and petrographer geologist.

9. Counsel for the objectors contended that the fact that most of the technical employees object to being included in the same bargaining unit as the office and clerical staff is an appropriate basis for excluding them from the unit. We do not agree. It is not at all uncommon during certification proceedings for an applicant trade union's support to be spread unevenly among different groups within the bargaining unit. However, the Board does not exclude from bargaining units those groups of employees whose support for the union is low. Equally, the Board will not permit a union to apply to be certified for only one group of employees within an appropriate unit because that is the only group that happens to support the union. See: *York Central Hospital* [1978] OLRB Rep. April 382. Instead, the Board's general practice is to first determine the appropriate bargaining unit and then assess the applicant trade union's support across the entire unit. We do not believe that a departure from this practice is warranted in the instant proceedings.

10. Although the respondent agrees with the applicant that the bargaining unit should include technical employees, at the hearing the respondent's counsel took the position that since most of the technical employees are opposed to being included in the unit, this is an appropriate case for the board to exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote. We are unable to agree with this contention. As indicated below, the applicant has met the statutory requirements for automatic certification. The fact that its support is not drawn evenly from all parts of the bargaining unit is not, in our view, a basis for declining to certify the applicant outright. The relevant consideration is the level of its support in the bargaining unit as a whole.

[Portions of the decision dealing with a dispute as to employee status omitted]

0349-83-R Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. **James River-Marathon Ltd. Pic River Forest Products Inc. Buchanan Forest Products Limited**, Respondents

Sale of a Business – Respondent acquiring pulp mill and woodlands operation – Simultaneously transferring woodlands operation to third company while retaining licence to timber limits, right of first refusal, reversion etc. – Whether respondent successor employer with respect to woodlands operation

BEFORE: George W. Adams, Q.C., Chairman and Board Members I. M. Stamp and C. Ballentine.

APPEARANCES: Laurence C. Arnold for the applicant; E. L. Stringer, Q.C. for the respondent James River-Marathon Ltd.; F. J. W. Bickford for the respondent Pic River Forest Products Inc. and interested party; and J. R. Comuzzi for the respondent Buchanan Forest Products Limited and interested party.

DECISION OF THE BOARD; October 14, 1983

1. This is an application pursuant to section 63 of the *Labour Relations Act* alleging that James River-Marathon Ltd. is a successor employer to American Can Canada Inc. and subject to a collective bargaining relationship between the applicant trade union Local 2693 and American Can Canada Inc. (hereinafter referred to as "American Can").

2. The most recent collective agreement between American Can and Local 2693 commenced September 1st, 1980 and expired August 31st, 1982. Under Article III entitled 'Recognition – Jurisdiction' the collective agreement provided:

3.01(a) The Company recognizes the Union as the sole collective bargaining agency for all of its employees who are engaged in woods operations on the limits, and on the work sites of the Company. For purposes of this Article, Company employees shall be all those employed in the job classifications set out in the wage schedule attached to and forming part of this Agreement, including those who are employed on job classifications which may be established and become part of the attached wage schedule during the term of this Agreement.

3.01(b) The employees of contractors engaged by the Company on the limits and work sites of the Company shall be considered employees within the terms of this Agreement; save and except the employees of contractors and/or the contractor who are engaged to perform occasional special services not commonly performed by employees covered by the terms of this Agreement, employees of contractors where such contractors are engaged for the purpose of erecting structures and where such a contractor is bound by an agreement with a union or unions affiliated with a central labour body covering such work.

3.01(c) The Company and the Union agree that an operator who enters into a third party agreement with the Company and the Ministry of Natural Resources and produces forest products for the Company or any of the negotiating companies, shall have an agreement with the Union covering such operations.

3. This clause figures prominently in the matter. The provision was first agreed on between American Can and Local 2693 in a collective agreement covering the period 1968 to 1970. Evidence was adduced to establish that it is common to almost all "Woodlands Operations" agreements in northern Ontario. The applicant adduced collective agreements to this effect between itself and Great Lakes Forest Products Limited, Kimberley Clark of Canada Limited, Domtar Forest Products, The Ontario Paper Company Limited, Abitibi-Price Inc., E. B. Eddy Forest Products Ltd., and Spruce Falls Power and Paper Company Limited. Prior to the alleged purchase and sale American Can operated a paper mill at Marathon, Ontario and possessed a license from the Minister of Natural Resources with respect to certain extensive timber limits. American Can conducted a woodlands operation with respect to those timber limits and thereby provided wood fibre to its paper mill. It had a collective bargaining relationship with the applicant in regard to the woodlands operations. It also had collective agreements with the United Paperworkers International Union Local 548 for the mill and the Office and Professional Employees International Union and Its Local No. 219 with respect to office employees.

4. James River-Marathon Limited (hereinafter referred to as "JRM") admits that it is the purchaser of the paper mill from American Can. It further admits that it acquired the timber limits. However, it denies that it purchased American Can's woodlands operations. In effect, its position is that the woodlands operations were purchased by Pic River Forest Products Inc. (hereinafter referred to as "Pic River") a wholly owned subsidiary of Buchanan Forest Products Limited (hereinafter referred to as "Buchanan"). The applicant had brought a section 1(4) application against JRM, Pic River and Buchanan. It had also added Pic River and Buchanan as respondents in this matter. However, a settlement of the applications with respect to Pic River and Buchanan was arrived at with Local 2693 entering into a collective agreement with Pic River as one element of that settlement. Local 2693 then proceeded solely against the respondent JRM in this section 63 application. The section 1(4) application was withdrawn against all respondents including JRM. Throughout the history of these matters Pic River has acknowledged and claimed to be the successor of American Can in the woodlands and the only successor.

5. Mr. R. L. Jones, Vice-President of James River Corporation of Virginia, testified that that company had in 1982 purchased the Dixie Northern assets of American Can's parent in the United States. These assets were the paper-making assets of American Can's parent in the United States. It did not at that time purchase the Canadian operations and American Can and its parent continued to look for a purchaser of the Canadian operations until December of 1982. He testified that the Canadian operations were losing approximately \$2 million a month and it had been decided to close by the end of 1982. American Can approached James River Corporation of Virginia to determine its interest in acquiring the Canadian concern. After analysis, James River Corporation of Virginia concluded that for the Canadian operations to be viable there had to be a much lower cost of wood fibre. American Can had provided its own wood fibre from its woodlands operations and this was a highly capital intensive or costly method of acquiring such raw material. James River Corporation of Virginia concluded that

American Can was really under utilizing its woodlands operations by tying them so closely to its paper mill. Saw logs were being converted into pulp instead of selling them to sawmills and acquiring the residual chips for the pulp mill. James River Corporation of Virginia therefore concluded that it could not go ahead with the acquisition unless a method of obtaining lower cost fibre could be developed. Mr. Jones explained that the concept was to have Buchanan or an affiliate "purchase" the woodlands operations. Buchanan would then operate the woodlands in its own right and to its own account but under the timber limits in the name of JRM and subject to certain conditions aimed at maintaining the license and insuring JRM a source of fibre supply. In other words, there would be a transfer of the timber limits from American Can to JRM but JRM would not actively conduct the woodlands operations. This would be done by Buchanan or an affiliate and Buchanan and JRM would enter into a fibre supply and land management agreement guaranteeing a supply of fibre to JRM. However, American Can wanted to deal with only one buyer.

6. Once it was determined that these various interests could all be accommodated, the scheme of the transactions took the following form. An asset purchase agreement dated March 7th, 1983 was entered into between (1) American Can Company, a New Jersey Corporation and the parent of American Can Canada Inc., (2) American Can Canada Inc., (3) JRM, (4) James River Corporation of Virginia, and (5) Buchanan Forest Products Limited. JRM was described as "the buyer". The consideration flowing from the buyer to American Can and its parent was \$5 million in cash and an assumption of approximately \$5 million in liabilities for a total purchase price of \$10 million. By a shareholders' agreement of March 7th, 1983 James River Corporation of Virginia and Buchanan Forest Products Limited agreed to purchase \$8 million and \$2 million respectively in value of the common shares of JRM. In a document of the same date referred to as the "Fibre Supply and Local Management Agreement", Pic River and Buchanan were given exclusive right to cut on the timber lands in return for guaranteeing JRM access to wood fibre at a reasonable price. Buchanan agreed to take the necessary steps to maintain the license and to be paid his related out-of-pocket expenses in this regard together with a management fee. Certain rights of first refusal to pulpwood and pulp chips was also granted to JRM. Subsequently, by assignment agreement dated April 22nd, 1983 between JRM and Pic River, JRM transferred and assigned to Pic River its contractual rights pursuant to the asset purchase agreement to purchase from American Can and to parent the woodlands equipment essential to carrying on the woodlands operation. JRM also transferred and assigned to Pic River its contractual rights pursuant to the asset agreement to acquire American Can's rights in the leases to certain leased equipment dedicated to the conduct of the woodlands operations and Pic River assumed all liabilities and obligations with respect to these leases. Mr. Jones testified that Pic River did not pay JRM any cash for the assignment of these rights and liabilities and testified that the value of the owned equipment was close to the liabilities existing pursuant to the leased equipment. American Can by Assignment and Bill of Sale dated April 22nd, 1983 transferred to Pic River "right, title and interest,..." in and to all of the assets pertaining to the woodlands operations. In turn, Pic River executed a "instrument of assumption" dated April 26th, 1983 and assumed and agreed to pay and fully discharge all the assumed obligations with respect to these assets and liabilities. By memorandum of agreement dated the same date, April 22nd, 1983, JRM and Pic River entered into what is referred to as a third party agreement whereby JRM granted to Pic River the right to cut and remove timber from the area subject to its timber limits and Pic River agreed to comply with and honour all the obligations to the Ministry of Natural Resources to which JRM was bound by virtue of its license of the timber limits. Pursuant to this agreement, JRM is to have the right of first refusal exercisable annually on all pulpwood

produced by Pic River in the area. Mr. Jones testified that it planned to obtain 80% of its wood fibre in the form of wood chips pursuant to contracts negotiated by Buchanan on JRM's behalf with sawmills in the area. The other 20% of its wood fibre would come from hardwood and which might come from the timber cut by Pic River on the timber limits. He testified that there needed to be no direct relationship between the wood fibre and the timber cut by Pic River and sold to the various sawmills in the area. JRM, therefore, did not expect to have to rely on its right of first refusal on all pulpwood produced by Pic River in the woodlands area and to the chips derived from the sale of saw logs.

7. Buchanan Forest Products Limited (described as Buchanan) is the corporate vehicle of Ken Buchanan who operates a number of mills and cutting operations in Northern Ontario and employs approximately 2,000 employees. The Board was advised that Buchanan had collective bargaining relationships with the applicant. Mr. Jones testified that JRM had no expertise in conducting woodlands operations and that the willingness of Buchanan and its affiliate to acquire such operations was absolutely vital to the overall transaction being proceeded with. JRM has acknowledged that it is the successor employer under the contracts with the paperworkers and the OPEIU. All of the management personnel and all of the employees of Pic River are former employees of American Can. Only two management people of American Can formerly working in its woodlands operations were hired by JRM. They are an industrial engineer and a purchase wood superintendent. Pursuant to the asset purchase agreement JRM assumed the liabilities under a voluntary pension plan pertaining to the woodlands operation but it advised the Board that it intends to discontinue this plan. Mr. Jones testified that there is no day to day direction of the woodlands operations by anyone associated with JRM. This was also the evidence of William Goodfellow, President of Pic River. Mr. Goodfellow, however, acknowledged that Mr. Buchanan was the sole shareholder and director of Pic River and that Pic River's line of credit at present is none existent. Accordingly, Pic River is being carried by Buchanan Forest Products Limited until it becomes a self-sustaining operation. All of the woodlands expertise formerly possessed by American Can through its senior employees is now possessed by Pic River.

8. The principal provisions of these interrelated transactions described above are worthy of a more detailed review.

Asset Purchase Agreement, March 7th, 1983

9. This agreement begins by noting that American Can and its parent desire to sell to the buyer those assets relating to the business of the Marathon Pulp Division of American Can which business consists "of the operation of the pulp mill at Marathon, Ontario, Canada and associated facilities (the "Marathon Mill"), the marketing and sale of pulp produced at the Marathon Mill and the related wood supply system..." (emphasis added). It provides that James River Corporation of Virginia and Buchanan Forest Products Limited will be the only stockholders in the buyer, JRM. Article 1.1 provides for the transfer of all assets, properties and rights relating to the Marathon operations including "all rights, to the extent transferable, with respect to the Crown lands; and all purchased wood or fibre supply agreements and related rights of refusal." Article 2 provides for the assumption of various liabilities by the buyer including all liabilities and obligations under all contracts, licenses, leases and permits and liabilities associated with three pension plans. Article 4 deals more specifically with the employee benefit plans and particularly the pension plan for employees of American Can and Local 2693. Article 11.2 provides that American Can would conduct negotiations with respect

to the woodlands blue collar workers' union in respect of a renewal collective agreement governing the woodlands obligations but that "subject to the consent of the union bargaining committee a representative of the buyer would be allowed to attend such meetings and any memorandum of agreement entered into in respect thereof would be subject to the ratification by the buyer". Article 12.8 makes the agreement subject to the buyer receiving approvals from the Government of Ontario respecting "the grant of transfer to the buyer of cutting rights or other rights in respect of the Crown lands...". Article 17.2 of the agreement provides:

This agreement shall be binding upon, inure to the benefit of, and be enforceable by, the respective successors and assigns of the parties hereto; provided, however, that neither this Agreement nor any of the rights, interests or obligations hereunder shall be assigned by any of the parties hereto without the prior written consent of the other parties hereto, except that the Buyer may transfer the right to receive any of the Assets or the obligation to assume any of the Assumed Obligations to any person which is an Affiliate of the Buyer, James River or BFPL, including, but not limited to, a pulp sales subsidiary of the Buyer; provided that the Buyer shall remain liable to pay any amount under Article V hereof which is not paid by such transferee and to discharge any Assumed Obligations not discharged by such transferee.

Fibre Supply and Land Management Agreement

10. This Agreement dated March 7th, 1983 is between JRM and Buchanan Forest Products Limited (referred to as BFPL in the above quotation). The preamble notes that Buchanan was agreed "to act as woodlands manager for operations on JR-Marathon's timber limits...". By Article 2 Buchanan undertakes to use its best efforts to maintain a wood supply for the mill with a view to reducing so far as practicable the overall wood fibre costs of the mill. Buchanan is to negotiate with chip suppliers for suitable contracts consistent with the long term goals of the mill but subject always to the approval of JRM who shall enter into and execute on its own behalf any resulting agreements. To the extent JRM is unable to acquire chips for use in the mill, Buchanan agrees to use its best efforts to provide JRM sufficient round wood, and such round wood may be supplied by Pic River pursuant to a third party agreement with JRM. Disputes over the price of such round wood are to be referred to arbitration. By Article 3 Buchanan agrees, "as agent of JRM", to take such actions as may be necessary to maintain the Crown license. Buchanan agrees to abide by the terms of the Crown license. Buchanan also agrees to do a number of other things such as the building of roads and the maintenance of roads in order to maintain the rights of JRM in and on the licensed area. JRM is to compensate Buchanan for its out-of-pocket expenses in this respect. JRM shall grant to Buchanan and Pic River full rights to enter upon and use any and all licenses of occupation and facilities which may reasonably be required in relation to their operations. By Article 3.4 JRM agrees to transfer or cause to be transferred to Buchanan or Pic River, as Buchanan may chose, all woodlands equipment subject to the earlier agreement of purchase and sale. The Agreement goes on to provide in Article 3.4:

In the event this Agreement is terminated as a result of default by BFPL or Pic River, as the case may be, BFPL or Pic River shall, at JR-Marathon's request, return all of such owned equipment still held by them and all of such leased equipment still maintained by them to JR-Marathon

subject to JR-Marathon assuming any unpaid obligations on such leases....

11. By Article 3.5 Buchanan agrees that "since JR-Marathon is causing its woodlands related equipment to be transferred to BFPL, BFPL will provide such maintenance, construction, roadbuilding or other services as may be requested by JR-Marathon on the lands within the licensed area. JR-Marathon shall reimburse BFPL for all of its out-of-pocket costs incurred in connection with providing such services". By Article 3.6 JRM agrees to pay Buchanan on account of management fees for indirect corporation overhead an annual fee of 1% of the total annual costs to JRM of its wood fibre supply. By Article 4 Pic River and Buchanan are granted the exclusive right to cut and remove quantities of timber from the licensed area. The same paragraph notes that third party agreements will be entered into by the parties having a two year duration and shall be renewable from time to time over a ten year period. Article 5 provides for the term of the fibre supply agreement which is ten years unless notice is given in writing two years before the expiration date. If it is not terminated, it automatically renews for another ten years. The agreement also terminates in the event of default.

Shareholders' Agreement, March 7th, 1983

12. By this Agreement Buchanan obtains a one-fifth interest in JRM. There are restrictions on the disposition of the shares without the written consent of the other. There is also a right of first refusal with respect to the disposition of the shares. Paragraph 10 also provides that in the event that Buchanan defaults under the woods supply agreement James River of Virginia shall have the right to buy all of Buchanan's shares in JRM. The same right is given to James River of Virginia in the event of Ken Buchanan's death. There is also the right to inspect Pic River books relating to expenditures of Pic River for which it seeks reimbursement from JRM.

Assignment Agreement, dated April 22nd, 1983

13. By this Agreement JRM transferred and assigned to Pic River its contractual rights pursuant to the Asset Purchase Agreement to purchase the American Can woodlands equipment and it further assigned its contractual rights pursuant to the same agreement to the leases of such equipment. Pic River assumed the rights and liabilities. This assignment did not relieve JRM of its obligations under the Asset Purchase Agreement to discharge any assumed obligations relating to the leases set forth which are not discharged by Pic River. Pic River also consented to be bound by the provisions of Article 3.4 of the Fibre Agreement permitting JRM to reclaim the equipment in the event of default. It is understood that Pic River "will have the right to sell all or any part of the woodlands equipment to BFPL provided BFPL shall, in any such event, assume all obligations with respect thereto and be bound by the terms of the Fibre Agreement relating to such equipment as if it were the original transferee from ACCI."

The Third Party Agreement, dated April 22nd, 1983

14. This Agreement is between JRM and Pic River. It grants the right to Pic River to cut and remove wood in the annual cut, subject to approval issued by the Ministry of Natural Resources. Pic River agrees to prepare and submit to the Ministry of Natural Resources var-

ious plans subject to review by JRM prior to filing. Pic River also agrees to conduct itself in a manner in order that the license to the timber limits be maintained. Paragraph 7 provides:

JR-Marathon shall have the right of first refusal exercisable annually on all pulpwood produced by the company in the area. Any contract for the sale of saw logs produced by the company in the area shall contain a right of first refusal at its beginning and exercisable annually thereafter by JR-Marathon in respect of any chips derived from such saw logs.

15. The license to cut Crown timber transferred from American Can to JRM was put in evidence. It imposes a variety of obligations on the license holder and requires compliance with the *Crown Timber Act*, and its regulations. It is clear from the provisions of the license and related documentation that the Ministry of Natural Resources expects and requires the active cutting and management of the timber limits.

16. At the time of the alleged sale, American Can was engaged in bargaining with the applicant for a renewal of the collective agreement which expired August 31st, 1982. Section 63(1) and (3) of the *Labour Relations Act* provide:

63. – (1) In this section,

(a) “business” includes a part or parts thereof;

(b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

17. The applicant and Pic River have now entered into a collective bargaining agreement for Pic River employees working in the woodlands. Pic River, by virtue of the fibre supply and land management agreement, has the exclusive right to cut and remove quantities of timber from the licensed areas. Pic River acquired all of the equipment owned or leased by American Can to operate the woodlands and the acquisition of this equipment was facilitated by the assignment of rights acquired by JRM from American Can as a result of the asset purchase agreement of March 7th, 1983. Pic River is a wholly owned subsidiary of Buchanan and Buchanan contributed \$2 million to JRM. All of Pic River’s employees are former American Can employees including its management.

18. Having regard to all of the evidence, we are of the opinion that JRM by its agreement with American Can on March 7th, 1983 acquired a business which consisted of the operation of the Pulp Mill and the related wood supply system, meaning the woodlands operation. The agreement of March 7th makes this acquisition of everything American Can owned and operated abundantly clear. Central to the woodlands operation was the license and the entire transaction was made subject to the approval by government of the transfer of this license. However, it is clear from Mr. Jones' evidence and from the content of the March 7th agreement with American Can (particularly Article 17.2) that JRM never intended to operate the woodlands operation itself. Thus, while retaining the license to the timber limits, JRM transferred its rights to the woodlands operations equipment to Pic River and at the same time executed a third party agreement pursuant to the exclusive rights accorded to Pic River by the fibre supply and land management agreement. At paragraph 37 of *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 at p.1210 the Board made the following observation which is relevant in the case at hand:

The present case involves a form of subcontracting, and subcontracting arrangements always involve the transfer of work. Work or services performed by A's employees within A's own organization are "contracted out" to B, and B uses his own managerial skills, plant, equipment and "know how" to supply to A, for a price, the product, services, facilities or components formerly produced by A's employees. A, therefore, is contracting for the use of B's economic organization in lieu of his own. A is generating a particular demand, or market, for B's product, and it is implicit in the arrangement that, thereafter, the two businesses will remain in a kind symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship, between the two parties is implicit in subcontracting and does not, in itself, establish a transfer of all, or part, of a business. If it is clear on the evidence, however, that B is unable to fulfill A's requirements with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees or know how, then the transaction no longer looks like a simple contracting out of work. A may not be making use of B's economic organization, rather A may be transferring part of his economic organization to B (and recall that section 55 is triggered by the transfer of "part of a business") or merely permitting B to make use of his (A's) organization while retaining control and direction of the related economic activity. Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience, be purchased by B. None of these factors unequivocally demonstrates or foreclose the application of section 55 (or section 1(4)). If, however, "but for" the transfer of such assets, licences, know how or property interests from A, B would be unable to fulfill the contract, then it is easier to infer a transfer of part of A's business – albeit a part which A no longer wishes to operate itself.

While we are satisfied that JRM acquired the Pulp Mill and woodlands businesses, we are also satisfied that JRM in turn transferred or leased the woodlands business to Pic River in

consideration for monies received from Buchanan and for Pic River's assumption of the liabilities arising under the leases of equipment together with certain other commitments and obligations i.e. the rights of first refusal etc. It is to be noted that section 63(1) acknowledges that a business can be sold in part and that a sale includes "leases, transfers and any other manner of disposition...". This arrangement was unlike a classic subcontract in that Buchanan was already in the woodlands business and Pic River (Buchanan's designate) is not operating these lands primarily for the benefit of JRM. JRM has been assured of wood fibre from other sources and Pic River is operating the woodlands with a view to external markets. The exclusiveness of the contract; the transfer of the equipment; and the transfer of employees and management all point to the transfer of a business and against the finding of a mere subcontract. We point out that there is no section 1(4) application before the Board by which we might assess the significance of the close commercial inter-relationship of JRM and Buchanan. This is not a triumph of form over substance. JRM is using the license to ensure it a long term source of wood fibre but in the short run has determined to obtain its wood fibre from other sources (presumably at a lower cost) in return for allowing Pic River to operate the woodlands for its own benefit. Indeed, any wood fibre coming from the woodlands will be paid for by JRM at market value.

19. This is not a case like *Prudent Investments Inc.*, [1981] OLRB Rep. Nov. 1611. There the predecessor had truly subcontracted a part of its business, the cleaning of buildings, prior to the sale of the buildings being cleaned. The Board held that an integral aspect of running an office building was the provision of cleaning services either by employing one's own employees to do the work or by retaining an outside contractor to do it. Thus, the Board held that the purchaser of the buildings was also in the business of cleaning those buildings and was subject to the union's bargaining rights should it in the future directly employ its own cleaning staff. An integral part of operating a pulp and paper mill is not, by JRM's business strategy, the running of a woodlands business provided that sufficient wood fibre can be obtained from other sources. This is the point of the fibre supply agreement. The owning of a license to the timber limits does guard against a mill being "held to ransom" by others who would otherwise control access to wood fibre.

20. In the facts at hand, the applicant union did not take the position that Pic River was a mere subcontractor unaffected by section 63. Indeed, this section 63 application insofar as it was brought against Pic River was settled by the union entering into a collective agreement with Pic River. It is not, as well, a subcontract within the meaning of *Metropolitan Parking Inc.*, *supra*, having regard to Article 17.2 of the asset purchase agreement and to the relationship of Buchanan to JRM and Pic River. Given these various relationships and having regard to the third party agreement, the fibre supply agreement, and the transfer of the equipment and employees, the commercial transaction between JRM and Pic River more closely resembles the transfer of a business from a labour relations viewpoint.

21. In coming to this conclusion we have not ignored the fact that JRM did not dispose of the woodlands operations irrevocably. It retains the license to the timber limits and a right of first refusal to pulp wood produced by Pic River in the area. There is also a provision for the reversion of the woodlands equipment to JRM in the event of default by Buchanan or Pic River. We further note that the *Crown Timber Act* places affirmative obligations on the licensee which Buchanan and Pic River will undertake as the "agents" of JRM and at the cost of JRM (and presumably including the 1% management fee). The ongoing statutory responsibilities of JRM to maintain the license and the fact that the *Crown Timber Act* very much

ties the issuance of licenses to the operation or supply of a mill have contributed to our finding in paragraph 18 that JRM initially acquired both the mill and the woodlands operations. In coming to this finding we reject the submission that JRM was simply a convenient intermediary to a transaction between American Can and Pic River. Nevertheless, we have held that JRM went on (simultaneously) to transfer the woodlands operations to Pic River the way a landlord might transfer his immediate right of occupancy to a tenant. We decline to hold that JRM's continuing control of the license leaves it retaining a part of a business amenable to the declaration sought, particularly without the aid of a section 1(4) application. However, it is our view that we need not decide at this time whether section 63 will have application on the expiration of JRM's arrangement with Pic River or should JRM either begin to operate the woodlands with its own employees or grant a right of access to the woodlands area to other contractors. In other words, it is premature to determine the application, if at all, of the various approaches taken by labour boards in *John Lester Drugs Ltd.*, [1982] OLRB Rep. June 886; *City of Peterborough*, [1979] OLRB Rep Feb. 133; *Taylor Ford Sales Ltd.*, [1981] 1 Can. LRBR 138 (N.B.); *Interior Diesel and Equipment Ltd.*, [1980] 3 Can. LRBR 563 (B.C.); and *Metropolitan Parking Inc.*, *supra*.

22. This application is dismissed.

0836-83-U Ontario Nurses' Association, Complainant, v. Kingston General Hospital, Respondent

Employee – Interference in Trade Union – Several employer attempts to have unit supervisors excluded as managerial unsuccessful – Employer assigning grievance and disciplinary functions not unlawful in absence of anti-union animus – Board recommending discussion

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *Judith McCormack, Karen Leeder, Marianne Hunter and Elinor Leakey for the complainant; K. McGeorge, B. Snider, Donald Halpert, Steve Knox and R. A. Little, Q.C. for the respondent.*

DECISION OF THE BOARD; October 12, 1983

1. This is a complaint filed under section 89 of the *Labour Relations Act* alleging that the Kingston General Hospital ('the Hospital') has violated sections 3, 64, 66 and 70 of the Act. Those sections provide as follows:

[Sections omitted]

• • • •

2. The complaint in summary is that the Hospital's job description for the classification of unit supervisor, a classification which is included in the bargaining unit, contains

statements requiring unit supervisors to process grievances at the first step of the grievance procedure set out in the collective agreement between the parties and to discipline other bargaining unit employees whom they supervise. The complainant Ontario Nurses' Association ("the Association") contends that the existence of those provisions in the job description, when assessed in the context of the history set out herein of the Hospital's several unsuccessful attempts to have the classification excluded from the bargaining unit and regardless of whether the unit supervisors perform the duties described, creates a conflict of interest between their responsibilities to the Hospital and to their fellow employees in the bargaining unit. That conflict in turn impinges on their opportunity and ability to participate in the lawful activities of the Association. It is that result which Association counsel alleges makes the Hospital's conduct in continuing to state that the unit supervisors are responsible for processing grievances of bargaining unit employees and for disciplining those employees constitutes a violation of the Act.

3. The Association seeks, as relief, to have the Board:

- (1) issue a declaration that the Hospital has violated the *Labour Relations Act*;
- (2) issue a cease and desist order to the Hospital prohibiting the Hospital from continuing to assign to unit supervisors the duty of responding on behalf of the Hospital to grievances filed by other members of the bargaining unit and the duty to discipline members of the bargaining unit;
- (3) issue a cease and desist order to the Hospital prohibiting it from taking any action that would interfere with the right and ability of the Association to continue to represent all individuals and positions now within the scope of the bargaining unit;
- (4) any other remedy necessary to make the grievors whole.

4. The job title unit supervisor was adopted by the Hospital in March 1981 and replaced the earlier job title of head nurse. Head nurses had been included in the bargaining unit since the Board issued the certificate to a predecessor of the Association in June 1971. The application for certification had been made in January 1971 and, at that time, the Hospital sought exclusion of head nurses pursuant to section 1(3)(b) of the Act on the grounds that they exercised managerial functions. The Board conducted an inquiry into the duties and responsibilities of head nurses, found them to be employees within the meaning of the Act and included them in the bargaining unit covered by the certificate. The Association and Hospital concluded the first collective agreement in March 1972 and have concluded successive collective agreements since then, the most recent of which was made in April 1983 for the term October 1, 1982 to September 30, 1984. Throughout the terms of those collective agreements head nurses (and now unit supervisors) have been included in the bargaining unit. In March 1981, the Hospital reorganized its management structure for the stated aim of improving, amongst other things, the lines of reporting and communications and decentralizing the decision-making authority. The head nurse's job was part of the reorganization. The Hospital's view of what happened to the head nurses' job in the reorganization is that it was eliminated and replaced with a job of unit supervisor. The Hospital treated that job as one which was

not in the bargaining unit and, therefore, it ceased deducting union dues for the former head nurses who had applied for and been appointed to the new position of unit supervisor.

5. The Hospital's action triggered two grievances from the Association, both of which were heard by an arbitration board chaired by Gail Brent. The nature of the grievances required the arbitrator to determine whether a new classification had been created by the change and, if so, whether it was in the bargaining unit described in the collective agreement. With respect to those questions, a majority of the arbitration board concluded that "... Unit Supervisor is not a new classification but ... it should be regarded for all purposes under the collective agreement as substantially the same as the Head Nurse classification.". Prior to coming to that conclusion, the majority award comments as follows:

".... It may be that the job of Head Nurse/Unit Supervisor is changing or has changed to the extent that it may no longer be possible to consider them employees under S. 1(3)(b) of the Act. If that is so, then there is provision in S.95(2) of the Act to apply to the Ontario Labour Relations Board to seek to have the classification excluded from the bargaining unit. Such a determination is beyond the powers of this board which must concern itself only with the interpretation of the collective agreement."

6. In July 1982, the Hospital filed a referral under section 106(2) [formerly section 95(2)] of the Act seeking a determination from the Board that unit supervisors exercise managerial functions and were not employees for purposes of the Act. The Board followed its customary procedures, authorized a Board Officer to inquire into the duties and responsibilities of unit supervisors, received the submissions of the parties on the evidence contained in the Board Officer's report and issued its decision April 27th, 1983. The Board as constituted in that case had before it the same job description for unit supervisors as is before the Board herein. It concluded that unit supervisors were employees for purposes of the Act. In arriving at that conclusion, the Board stated the purpose of excluding from the Act persons who, in the Board's opinion, exercise managerial functions, to be one of ensuring "... that persons within a bargaining unit do not find themselves faced with a conflict of interest between their responsibilities and obligations as managerial persons, and their responsibilities as trade union members or employees in the bargaining unit.". The Board went on to review at length the reasoning behind that purpose, the Board's criteria for determining whether persons were exercising managerial functions, and relevant Board jurisprudence on the issue. The Board took note of the authority in the job description with respect to discipline, grievance handling and certain other duties and commented:

"If these and other duties listed on the job description were in fact exercised by the unit supervisors, we would have no hesitation in finding the unit supervisors to be persons who exercise managerial functions. There is no question that the job description indicates that the unit supervisors have a real and independent decision-making authority which would be incompatible with membership in the bargaining.".

The Board noted, however, that the evidence before it indicated a very different role for unit supervisors than that set out in the job description and, having examined that role, found "... little concrete evidence ... of the kind of actual conflict of interest to which [the exclusion of persons who exercise managerial functions is directed]." After applying the Board's usual

criteria to the evidence before it, the Board was unable to conclude that unit supervisors exercise managerial functions.

7. When the Association received the Board's decision, it wrote to the Hospital on May 10, 1983 as follows:

Following receipt of the Ontario Labour Relations Board's decision re Unit Supervisor, please be advised that the Association believes that it is inappropriate for the Unit Supervisor to be involved with the grievance procedure or to be involved in formal disciplinary matters.

The subject matter of the Association's letter was discussed at a meeting of the parties on June 13th and, by letter dated June 28th, 1983, the Hospital replied to the union's request as follows:

This is in response to your letter of May 10, 1983 and our discussion on June 13, 1983.

We are not prepared to delete the Unit Supervisors involvement in the grievance procedure or formal disciplinary matters at this time.

This complaint was filed July 19th and it is the position taken by the Hospital in its June 28th letter which the Association alleges violates sections 3, 64, 66 and 70 of the Act. In other words, the Hospital, by continuing to have the job description for unit supervisors ascribe to them the duties of processing and replying to grievances of bargaining unit employees at the first step of the grievance procedure in the collective agreement and of disciplining bargaining unit employees, violates the aforesaid sections of the Act. The Association does not base its claim that the Act has been violated on any allegation that the Hospital harbours any anti-union motive.

8. The Association's argument in support of its allegation that the Hospital's conduct has violated the Act was framed against the rationale behind excluding from the collective bargaining relationship persons who exercise managerial functions. The assignment of such persons to the interests of employers and the resulting deprivation of their rights to collective bargaining, counsel claims, is an abridgement of the important right of all Canadians to the freedom of association now guaranteed and protected in the *Canadian Charter of Rights and Freedoms* and first recognized by the Parliament of Canada in 1918. Counsel argues that, since abridgement of that freedom arises out of a need perceived by the Federal and all Provincial jurisdictions in Canada to protect employers from the conflict of interest which would arise from the divided loyalties likely to be experienced by such persons if, at one and the same time, they were expected to represent the employer's interest in dealing with bargaining unit employees while they were represented in collective bargaining by the same bargaining agent and were in the same bargaining unit, this Board, in the case of Ontario, has an obligation to be sensitive to that same protection giving rise to interference with the rights and interests of unions. Counsel gave a number of examples where, with or without improper motive on the part of an employer, there could be unfair labour practices arising out of attempts or the aftermath of attempts to exclude persons from the bargaining process. The sheer number of cases where employers have sought managerial exclusions beyond those being sought by the unions applying for bargaining rights, counsel contends, expresses the labour relations reality

that the policy of excluding persons who exercise managerial functions from the bargaining relationship primarily benefits management and not unions. If the reality was that both parties benefited, counsel claims that we would not see these numerous attempts to exclude persons on the grounds of exercising managerial functions. In fact, counsel claims, the assignment to the side of employers of such persons has increased the opportunity for conflict of interest between the bargaining agents and their members and amongst their members and has increased the potential for interference with their rights under the Act.

9. It is against that background and the Hospital's three unsuccessful attempts to remove unit supervisors from the bargaining unit, counsel asserts, that the Board must assess the impact on the rights under Act of bargaining unit employees, including the unit supervisors, from the Hospital continuing to purport that the unit supervisors are responsible for, amongst other things, disciplining bargaining unit employees and processing their grievances. That requirement, counsel argues, creates a conflict of interest between the unit supervisors' responsibility to the Hospital and to their fellow employees in the bargaining unit which in turn interferes with their rights to participate in the lawful activities of the Association. The Association gave a number of examples where it saw the potential for interference with the rights and obligations of these employees under the collective bargaining to participate in the collective bargaining process as well as a potential for conflict with their duties and responsibilities as members of the Association under its constitution.

10. While the Board is not going to detail the Association's arguments or the examples it has given of the impact of the managerial exclusion policy on the rights and interests of unions or examples of the rights of employees alleged to have been violated by the Hospital's conduct in this particular case, the Board has reviewed these in the context of Association counsel's entire argument and suffice to say that the Board does not agree with counsel's view that, in the push and pull of the competing interests of the parties to a collective bargaining relationship, the assignment to employers of those persons who exercise managerial functions operates to the benefit of employers and not to trade unions. To that extent, the Board finds this complaint to be misconceived.

11. Counsel referred the Board to a decision of the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, [1974] 1 CLRBR at page 3, for an expression of why persons exercising managerial functions have been assigned by all legislative jurisdictions in Canada to the side of management. The passage to which counsel directed the Board's attention is the first paragraph in a quotation from that decision referred to in paragraph 8 of the Ontario Labour Relations Board's decision with respect to the Hospital's July 1982 referral under section 106(2) of the Act. See, [1983] OLRB Rep. April 551, paragraph 8 of which reads as follows:

"8. Section 1(3)(b) of the Act is meant to exclude from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons within a bargaining unit do not find themselves faced with a conflict of interest between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the 'two sides' whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade

union, nor the employer and its management team, need be concerned that its members will have 'divided loyalties'. This purpose was expressed as follows by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby* [1974] 1 CLRBR at page 3:

'The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management – on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for 'cause' or passed over for promotion on the grounds of their 'ability'. The employer does not want management's identification in the activities of the employees union. *More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel.* One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave

the bargaining unit when he is promoted to a position where he exercises management functions over it.”

(emphasis added)

12. As counsel for the Association correctly pointed out, the *District of Burnaby* decision explains the purpose of the managerial exclusion as protecting the arm's length relationship which is essential to effective collective bargaining. No doubt that is the rationale underlying section 1(3)(b) of the Act and the Board agrees with counsel that it is the rationale behind similar provisions in the legislation of the other jurisdictions in Canada. But the rest of the quotation goes on to describe the protections which this affords to both parties to the relationship. It is quite clear, from the emphasized passage quoted above, that real benefit accrues to bargaining agents as well as to employers, thus there is balance to the protection afforded by managerial exclusions. The maintenance of that balance and the weighing of the interests of employees represented and seeking to be represented in collective bargaining, their bargaining agents and the employers is part of the balancing which the Board does every time it determines on the facts before it whether a person exercises managerial functions, be it a representation application or a reference under section 106(2) of the Act. The protection of the interests of employees, bargaining agents and employers lies in that balancing. The result of that balancing may be less than perfect in the eyes of the beholder. For example, some or all of the unit supervisors may have been satisfied to retain their access to the collective bargaining process, but find themselves in a state of limbo, to use Association counsel's term, with respect to their relationship with other members of the bargaining unit and with the Hospital's management because their duties contain some elements of managerial function, although not enough to exclude them from the bargaining unit. This is frequently the lot of persons who occupy a lead-hand type of job. Absent evidence of anti-union motives or evidence that the state of limbo is interfering with rights protected under the Act, the mere presence of that state is not a violation of the Act.

13. The respondent's motive is not an issue in this complaint and the Board finds that there is no evidence before it which would sustain the allegation that the Hospital's conduct referred to herein violates the Act. In the result this complaint is dismissed.

14. While the Board is satisfied that the facts of this case do not substantiate the alleged violation of the Act, the Board remains concerned about one aspect of it. As was the situation in the earlier proceedings before the board of arbitration and another panel of this board, there is no anti-union sentiment at play here. There is nothing in the evidence before the Board herein, including the findings of fact made by the earlier tribunals, which suggests that the parties do not have an effective collective bargaining relationship. It is patently clear that the Hospital, for sound management reasons, wishes to introduce a new level of managerial authority which would subsume all of the duties previously performed by head nurses and would include the authority and responsibilities set out in the job description with respect to the processing of grievances and the exercising of discipline. In these circumstances, rather than the Hospital baldly asserting its management rights to structure the work force and the Association pursuing its legal rights under the Act, it seems to the Board that they might better serve the interests of their respective constituents by discussing and resolving the issue.

15. The earlier decision of the Board, differently constituted, and the arbitration award offer reasonably clear guidelines for the Hospital with respect to the action it should take if

it wishes to succeed in having unit supervisors accepted as exercising managerial functions and thus not employees in the bargaining unit. A decision to take such action is one which the Hospital can make without any requirement under the collective agreement to discuss or negotiate it beforehand with the Association. The impact of that decision on the bargaining unit employees, particularly the unit supervisors, is, however, a potentially beneficial subject for the discussion between the parties, whether or not the collective agreement obligates discussion. Such discussion could enable the hospital to ascertain through the Association which of the unit supervisors would be content to leave the benefits of collective bargaining behind them for whatever opportunity they see in the new position and which employees might prefer to forego the unit supervisor job in order to retain access to the collective bargaining process. If some employees were to exercise the latter option, it would be left open for the parties to explore and determine what job assignments and working conditions would be available for those employees; what effect their choices might have on other bargaining unit employees; and, whether bargaining unit employees would receive any preferential consideration in applying for immediate and/or future unit supervisor openings. At the very least, discussion would clarify for the present unit supervisors the consequences of remaining in that job.

0850-83-U Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 597, Complainant, v. **C. E. Lummus Canada Ltd.**, Respondent, v. Labour Relations Bureau of the Ontario General Contractors Association, Intervener

Interference in Trade Unions – Lockout – Unfair Labour Practice Employer faced with financial problem seeking relief from obligations under provincial agreement – Imposing reduced hours as alternative on members of union refusing concession – Elements of lockout established – Reliance upon concession agreed to by major trade on project no justification – No undue pressure to grant concession established – Arrangement inconsistent with provincial agreement breach of section 146(2)

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. Wilson and C. A. Balentine.

APPEARANCES: *David Strang, Bill Fairservice and D. Little for the applicant; R. C. Filion, C. McClelland, T. Ervin and K. Pierce for the respondent; Bruce Binning and Jim Thomson for the intervener.*

DECISION OF THE BOARD; October 17, 1983

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging that the respondent employer, in attempting to have the members of the applicant work under terms and conditions less favourable than their provincial collective agreement, has violated sections 64, 66(a), 67, 72, 75 and 146(2) of the Act. The intervener represents the employer bargaining agency for the instant provincial agreement, and appeared without objection on the section 146(2) issue to protect, as it said, its provincial agreement.

2. The project at which the dispute arose is a nuclear reactor facility under construction in Port Hope for Eldorado Resources Limited. Another branch of the project is currently under way at Blind River. The respondent Lummus is the prime contractor at both locations. As background to the dispute, it appears that Lummus and the owner, Eldorado, had for some time in 1983 been discussing the cost overruns being projected for the job. The major work on the project had, by this point in time, become pipefitting, and Ken Pierce, the respondent's Construction Manager, testified that the cost overruns were in the main attributed to a decline in productivity from the pipefitters and pipefitter-welders on the job. This group made up roughly one-half of all of the tradesmen employed on the site at this point in time. The Pipefitters' collective agreement called for a 36-hour work week, composed of 8-hour shifts Monday to Thursday, and a four-hour shift on Friday. Lummus attributed the decline in the pipefitters' productivity to the very high rate of absenteeism amongst pipefitters and welders being experienced on Fridays, together with the overall low morale caused by a number of factors, including a change in methods of payment under the most-recently negotiated provincial agreement. It is not clear whether the Pipefitters' discontent was limited to the Friday work, but it is clear that they, as a group, were deliberately slowing the job down. By mid-May of this year the productivity of the pipefitting group had dropped to 25 per cent of Lummus' initial projections for the job, from a level of 120 per cent in January of the same year. The cost overruns projected from these figures were of major proportions and the owner, Eldorado, made it clear that it was not prepared to tolerate them. The evidence is that Eldorado at that point told Lummus it could have one more month to "turn things around", or the prime contract would be terminated and Lummus would be removed from the job site.

3. From that point Lummus began exploring with Eldorado various alternatives for bringing the project back within tolerable projections. Lummus' activities included a number of meetings with the Pipefitters' chief spokesman in Canada, Mr. St. Eloi. Out of these meetings came a suggestion, apparently from Mr. St. Eloi, that the members of the Pipefitters' Union work their 36-hour week on the basis of four nine-hour days, thus eliminating the problem of Fridays altogether. The ninth hour in each day would be paid on a straight-time basis. The employees' position on other benefits, it was suggested, could be maintained by Lummus agreeing to pay the normal 5 days' travel allowance for 4 days' work. Subsequent to the meeting, Lummus and Eldorado began discussing between themselves the various ways of implementing this suggestion with the other trades. One possibility was to pay for the ninth hour in each day on a premium basis as the various trades' collective agreements called for. The other alternative was to approach these other unions and see if they would agree to the same arrangement as the Pipefitters, i.e., making up the extra hours each day on a straight-time basis. It was decided that this latter was the alternative which Lummus would follow.

4. Lummus accordingly convened a meeting of all of its stewards on June 22, 1983, and explained to them what it was that was being considered. Lummus told the stewards that a number of craftsmen had approached it about going to a four-day week, and that it wanted to know how the rest of the trades on the job felt about it. It suggested that the stewards accordingly poll their members on the job to ascertain their wishes. Lummus also suggested that it might be best if this were done in writing, and offered the services of Ms. Bembenek, a clerk in the Personnel office, if anyone had a problem with the drafting.

5. Mr. Don Little, the complainant's steward on the job and a member of the Union's Executive Board, testified that he went to Ms. Bembenek to have a petition drafted up, and then proceeded to canvass his members on the job. He testified that he was not personally

in favour of the change in hours but felt it was proper to give the men their say. He says he did not feel he was under any compulsion to carry out the poll, and concedes that he could have consulted his Business Manager as well. He says he did not do so at that point because he felt he had nothing to report; he knew a meeting between the company and the Business Managers was being set up, and he did not know yet whether there was any support amongst his members for a change. Mr. Ervin, the Labour Relations Manager for Lummus, met Mr. Little in the time office a few days later and Mr. Ervin asked him how the canvass was going. Mr. Little replied that all of the Labourers but two had signed the sheet. Mr. Ervin asked him if he was going to turn the sheet in, and Mr. Little said that he would see what he could do about the other two signatures. Mr. Little was never again asked to turn in the sheet.

6. On June 29th the meeting with the Business Managers took place. Unfortunately for Lummus, the Business Manager for the Pipefitters was not able to attend. Some of the other Business Managers expressed concern that they had not been consulted earlier, and that representatives of the appropriate provincial bargaining agencies had not been contacted. In any event, the meeting concluded with virtually unanimous rejection of the company's proposal. The final portions of the published Minutes of the meetings state as follows:

The LCI personnel then left the meeting to allow time for the BA's to discuss the proposal. The outcome was that eight Unions out of nine would live by their agreements. It was pointed out by the BA's that they felt the matter had been approached in the wrong way and they should have been involved earlier as any amendments to their Collective Agreements must go through proper channels. Mr. Ervin explained that, in this instance, it was the individual employees who were seeking the change.

Mr. Pierce advised that split shifting would now be considered with the UA, Boilermakers, Sheetmetal workers and Insulators working a 4 day week. The other trades could be left as they were, although Supervision and work planning would be a problem.

Mr. Ervin said that as the majority of BA's did not agree with the proposal a meeting would be held with the Stewards to explain the situation.

Mr. Pierce testified that the only other development at this point was that over lunch and cocktails following the meeting, certain of the Business Managers (these were not identified) began to indicate a more flexible attitude towards Lummus' proposal. Mr. Pierce reported all of the morning's events to Mr. Zimmerman at Blind River, and Mr. Zimmerman expressed his disappointment that support for the proposal (which had apparently been put into effect at Blind River) had not been more clear-cut. A commitment to the nine-hour day proposal had still not been received from the local Business Manager of the Pipefitters, however, and the two men agreed that a decision on the matter would be put off for the time being.

7. The next morning Mr. Pierce convened a meeting of the job stewards to report to them the result of the Business Managers' meeting. He indicated that the majority of the Business Managers had not been in favour of the proposal, and that the change would be implemented for the time being on a piecemeal basis only, pending a decision by Eldorado on whether the site would be closed on Fridays. By mid-day, however, the commitment of the Pipefitters' Business Manager to the new arrangement was finally obtained in writing, and Mr.

Pierce contacted Mr. Zimmerman by telephone in Blind River to report that. Mr. Pierce testified that he and Mr. Zimmerman discussed how it would affect the job to have different hours scheduled for different trades, and how it would hurt them to have no hours scheduled on Friday (against the fixed costs of having to keep the site open for a fifth day). At the end of the discussion, Mr. Zimmerman made the decision to close on Fridays, and instructed Mr. Pierce to do so. He followed up his oral instruction by having the following letter signed and delivered to Mr. Pierce on Monday.

July 4, 1983

TO: K. R. PIERCE

FROM: W. K. ZIMMERMAN

SUBJECT: Cancellation of Friday Construction Work at the Port Hope
Construction Site

As discussed with you today E.R.L. cannot continue to absorb additional costs on this project. Therefore, due to the fact that the majority of the craftsmen on the project site are now working extended hours 4 days a week, you are hereby instructed that the jobsite shall remain closed on Fridays until further notice.

Meanwhile, Lummus had, pursuant to the oral instruction on Friday afternoon, posted the following notice:

To: All Employees

From: K. R. Pierce

Subject: 4 DAY WORK WEEK

Effective July 4, 1983, this job site will be scheduled for a four (4) day work week. Pipefitters, insulators, sheet metal workers, boilermakers and painters will be working extended hours on the 4 days to complete a standard work week in accordance with our agreement. Other crafts will be working 4 eight hour days unless some agreement is reached to the contrary.

This alteration to working hours has been made at the request of and with the agreement of the majority of crafts on site. Our Client has dictated that the job site be closed on Fridays. The hours of work shall be:

- (a) Crafts working 4 eights shall work 7:30 a.m. until 4:00 p.m.
- (b) Crafts working extended hours shall begin work at 7:00 a.m. and work until the completion of shift.

Pipefitters, sheetmetal workers, insulators shall work 9 hours per day; boilermakers and painters shall work 9-1/2 hours Monday, Tuesday & Wednesday and 9 hours on Thursday.

Lunch and break times shall remain as per the present arrangement, i.e., lunch at 11:30 a.m. and breaks at 9:30 a.m. and 2:00 p.m.

8. Mr. Pierce testified that by Friday, July 8th, only the Labourers, Electricians, Millwrights and Teamsters had declined to accept the company's proposal for extended hours on a four-day week. The evidence is that those members of the Labourers' Union normally scheduled to work the Friday showed up on July 8th, even though they knew that no work would be afforded them. This was done, Mr. Little testified, simply to "prove the lockout". The Labourers have, since the week of July 4th, been working only 8 hours a day, for the 4 days the site is open. Mr. Pierce acknowledged to the Labourers' counsel in cross-examination that the 9th or 10th hour is available to members of the union on each day, "but not on an over-time basis". The Millwrights and Teamsters apparently have subsequently accepted the company's offer, leaving only the Labourers and Electricians as hold-outs. Both of those unions filed lockout complaints with the Board, the Labourers' being the present one. The evidence of Mr. Little is that he attends at the job site to observe what is going on in both the half-hour before his shift and the half-hour after (when the other trades are working) and he observed Lummus supervisors doing cleanup, and, of more significance to him, carpenters doing labourers' work. Mr. Little conceded that the carpenters in his view have *always* been doing labourers' work, and that he complains to Lummus constantly, but says that the present situation is worse, because "at least at the other times we're there working with them". Mr. Pierce, on this point, agreed with counsel for the employer bargaining agency that, when forms are being worked on during these two half-hours, the difference in work hours has meant that Lummus has altered its normal crew complement of carpenters and labourers. It should be noted that the Labourers' have in fact filed a grievance against Lummus, but have allowed it to remain dormant, pending a hearing of the present application before the Board. That grievance is dated July 13, 1983, and claims that Lummus:

- (1) Failed or refused to employ members of the Union to perform *all Labourers' work* at its Port Hope Job Site on July 7, 1983, and continuing.
- (2) Reduced the regular work week of members of the Union employed at its Port Hope Job Site.
- (3) Sought and continues to seek by reducing the hours of work of members of the Union to cause the Union to agree to a change in the terms and conditions of employment at its Port Hope Job Site.

(emphasis added)

9. Mr. Strang on behalf of the applicant argues that the foregoing constitutes violations of a number of sections of the *Labour Relations Act*. He argues, firstly, that in initially seeking to go directly to its employees to effect a change in working conditions, and to attempt to "co-opt" the Union's steward to assist it in doing so, Lummus violated section 64 of the Act. Section 64 provides:

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

The Board ruled orally at the hearing that the evidence did not disclose any undue pressure on the job stewards, who had been approached as a group, on this extensive project, so as to constitute a violation of section 64. The Labourers' steward acknowledged that he felt perfectly free to refuse to poll his members, or to consult with his Business Manager in advance, and the Board in the particular circumstances of this case, does not find the employer's mode of contact with the union, through its steward on the site, to have been improper.

10. Counsel further argues that the respondent's conduct is a breach of section 66(a), and in so doing ties this section in with his reliance on sections 72 and 75 of the Act. The sections read:

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act...

72.(1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

• • • •

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

75. No employer or employers' organization shall call or authorize or threaten to call or authorize an unlawful lock-out and no officer, official or agent of an employer or employers' organization shall counsel, procure, support or encourage an unlawful lock-out or threaten an unlawful lock-out.

Counsel concedes that the collective agreement contains no guarantee of hours per week, but points to Mr. Pierce's acknowledgement that the make-up hours continued to be available on Monday through Thursday, if only the union were to agree to waive the provisions of the collective agreement. Under section 66(a), counsel argues that this is a "refusal to employ" in order to cause employees to refrain from exercising their rights under the Act, namely,

their right to insist that the provisions negotiated into their collective agreement be adhered to. But more particularly, counsel argues that the actions of Lummus constitute a lockout. "Lock-out" is defined in the Act as follows:

"Lock-out" includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employee to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees.

When the employer has 40 hours of work available, counsel argues, but says to the employees and their union, "You're only going to get 32 hours until you agree to a change in your agreement", that's a lockout.

11. The point raised is a difficult one. Given the definition of "lock-out", an employer who speaks during the term of a collective agreement of the need for concessions as a condition of further employment must be mindful of the basic structure of our *Labour Relations Act*. During the term of a collective agreement, an employer is not entitled to simply say, "I want a better deal, and I'm not going to continue to use your services, or part of your services, until I get it". That is prohibited as an untimely "lock-out", just as the opposite conduct on the part of employees and a trade union is prohibited as a "strike". On the other hand, an employer may, from time to time, find himself in a position where economic necessity has raised the spectre of management decisions which will significantly impact on the employment opportunities of his employees. In such circumstances, it would seem to make labour relations sense to permit the employer to invite the bargaining agent to engage in meaningful discussion designed to avoid or minimize such impact, and indeed, this has been a main theme of the Board's "bargaining in bad faith" cases in recent times. Compare *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577; *Sunnycrest Nursing Home*, [1982] OLRB Rep. Feb. 261; and *Consolidated Bathurst*, [1983] OLRB Rep. Sept. 1411. The Board's interpretation of the law ought not simply to deny the employees, through their trade union, (or employee bargaining agency, as the case may be) this opportunity for input in every case where the problem comes to a head during the term of the collective agreement itself. But, as noted, a fundamental prohibition exists against "lock-outs" or threatened "lock-outs" during the term of the collective agreement, just as it does for "strikes", and the Board must be scrupulous in its analysis of each case, lest a plea of "economic circumstance" be used to mask an attempt simply to obtain better terms and conditions than have been agreed upon in the collective agreement. The Board recognizes that the issue of "economic necessity" can be a complex one, making a judgment on the employer's true motivation difficult; but the Board cannot shy away from making such judgments, if employees through their bargaining agent are to be permitted an opportunity to exercise some degree of control over their economic lives, on the one hand, and the identification and control of unfair labour practices, engaged in under a cloak of "economic necessity", is to be achieved on the other.

12. As important as this issue is, Canadian jurisprudence on it has, to date, been sparse. The Alberta Labour Relations Board has, however, had some recent experience with it, most notably in the case of *Hotel and Restaurant Employees and Bartenders, Local 47 v. Royal*

Canadian Legion, 83 CLLC ¶16,013. There the Board summarized the essential facts as follows, at page 14,123:

At that “Union” meeting we find as fact that the employees were told that the Legion was losing money and there would have to be a roll-back or the Legion would have to implement self-service with an understanding by all that the implementation of self-service would cause lay-offs. It was also represented to the employees that the Legion could not live with the 12% increase and if a roll-back was not accepted, self-service would be implemented. At that meeting a substantial number of the employees, quite possibly a majority were in favour of a roll-back, and Local 47 later refused to accept the proposed roll-back.

and continued at page 14,125:

... The members [of the Legion] were informed that the attempt to obtain a roll-back had been unsuccessful and that henceforward the provisions of the agreement with respect to wages would be followed. In passing the resolution at that meeting to “back the Executive 100% in their proposition to go to self-service in order to maintain current costs to membership” the membership did so having accepted that there would not now be a roll-back. Having accepted there would not be a roll-back, the Legion made a decision to implement partial self-service in the Lounge and Canteen. That was a legitimate business decision.

On the basis of those conclusions, the Board found no “lock-out” to have taken place.

13. While the definition of “lock-out” has been considered in this province many times, our own Board has not had to deal with the issue of concessions in precisely this context. The issue did arise, however, in an unreported arbitration decision, *Midland Professional Firefighters Association v. Town of Midland*, (Prichard), released October 19, 1982. There the trade union accused the Town of engaging in an unlawful lock-out when, during the term of the collective agreement the Town, after expressing its concern over the richness of the most recently-negotiated salary increase, and inviting a trade-union response, laid off two members of the force. After framing the issue in terms of *bona fide* economic necessity, the arbitrator made his essential finding of fact that “[the Town official’s] inquiry about a possible wage roll-back was borne of his genuine desire to avoid layoffs and not of a desire to coerce the firefighters”. In his concluding remarks he then observed:

“In dismissing the grievance, I hope I have made clear that so long as the parties approach the matter in a good faith, the collective agreement and the law of labour relations do not create a bar to mutually beneficial discussions aimed at adjusting to changed economic circumstances.”

14. *Westinghouse Canada Limited*, *supra*, was itself a case where the employer was found to have unlawfully acted, during the term of a collective agreement, and without ever having raised the matter for response by the trade union, “to remove itself from the collective bargaining relationship”. But, having made that finding, the Board went on to consider, at paragraph 65:

... What of the employer who, faced with an economic crisis caused by collective-bargaining related factors, seeks relief from the union and is met with an unsympathetic or unsatisfactory response? Assuming that these factors could be established, the answer is by no means clear. The question, however, is not raised by the facts of this case.

15. The question is, however, raised in general terms by the facts of *this* case. Counsel for the employer argues that Lummus at all times acted with no choice in the matter, whether put in terms of the dictates of its client, or in terms of the economic turnaround which Lummus had to make to retain its presence on the job site. Either way, counsel argues, the situation arose solely as a matter of economic reality. Counsel points out that the closure of the site on Fridays became a fact as of June 30th, and that no one has taken the position that an owner lacks the right to dictate the hours of access to his job site. With the Friday work gone then, was it really an unfair labour practice, counsel asks, for Lummus to have approached the trade unions and offered them the opportunity to make up the hours Monday through Thursday on the only basis that it was felt the project could afford i.e., with an alteration to the collective agreement?

16. On the facts of this case, the Board must conclude that it was. That the dissatisfaction of the Pipefitters, and their consequent job action, was at the root of the present problem is beyond doubt. Nor do we doubt that that action was creating real economic problems for the job. But an employer, and especially a multi-trade construction employer, cannot select its response to such action without being mindful of its impact on the other groups of employees with whom it has contractual relations. Nor can pressure from an owner/client to cut costs, by itself, provide justification for attempting to do so in an unlawful way, if the Board finds the requisite motive for a "lock-out" still to exist. Here the employer, Lummus, clearly was mindful of the implications for the other trades, but it is its response to that situation which causes the Board concern. The Pipefitters' agreement meant that to maintain existing crew complements and construction levels, the other trades on the job would have to be put on 9-hour days as well. But both Lummus and Eldorado knew that the nine-hour day would attract overtime premiums under the other collective agreements on the site. That would have built back in much of the costs sought to be saved by the Friday closing, and was not an option that Lummus and the owner were willing to consider (particularly after they had just obtained a deal with the Pipefitters to work the make-up hours at *straight* time). On all of the evidence, the conclusion is inescapable that Lummus and the owner were banking on getting, one way or another, the agreement of at least the bulk of the other trades to the arrangement worked out with the Pipefitters. Having tried to obtain that agreement voluntarily, and failed, it appears to us that Lummus and Eldorado decided, the moment they had the Pipefitters' commitment in writing, to proceed with the closing on the calculated basis that the act of taking away the hours on Friday (and the refusal to pay overtime) would generate sufficient pressure to cause the other trades to fall in line; i.e., the other trades would agree to make up the hours on a straight-time basis. The ultimate response of the great majority of the trades bears out that thinking. Lummus states that it at all times was prepared to live with the possibility of the Labourers refusing to work the extended 4-day hours. Whether it did in fact live with that situation within the work-assignment provisions of its collective agreement would only be determined by litigation of the Labourers' grievance. But whether or not Lummus was prepared to live with that eventuality, it was patently to its advantage to bring as many of the trades as possible into line with its Pipefitter arrangement, and in drafting its Notice of June 30th, it clearly had decided to pursue that end. The Notice began, once again:

Effective July 4, 1983, this job site will be scheduled for a four (4) day work week. Pipefitters, insulators, sheet metal workers, boilermakers and painters will be working extended hours on the 4 days to complete a standard work week in accordance with our agreement. Other crafts will be working 4 eight hour days *unless some agreement is reached to the contrary*.

(emphasis added)

That invitation, together with all of the circumstances under which Lummus had approached the other trades, leaves no doubt in our minds that Lummus was aiming toward the goal of having *all* trades adopt a work week that was in line with the Pipefitters', without the necessity of having to pay overtime under the respective collective agreements.

17. The foregoing recital of the facts also makes it clear that the actions of the owner cannot, for purposes of the developments material here, be separated from those of the employer, Lummus, and the fact that the actual direction to close on Friday came ultimately from the hand of the owner is not, in the circumstances, determinative. In terms of deciding upon a specific course of action in response to the "Pipefitter" problem, it is evident that Eldorado was at all material times acting in concert with, and to a large degree on the advice of, Lummus. The two were not entitled to voluntarily enter into an agreement with the Pipefitters (lawful or otherwise) and then rely upon that agreement as part of the *de facto* justification for what would otherwise be a "lock-out" under the Act. The closure on Friday was a direct result of the agreement negotiated with the major trade union on the job site, and neither of those events can, in the circumstances of this case, be attributed to wholly external forces. The Board in the result finds that Lummus, when it followed through on its June 30th notice, engaged in an unlawful lock-out of the complainant's members.

18. A further serious problem in this case is that arising under section 146 of the Act, dealing with the special status of province-wide bargaining in the industrial, commercial and institutional sector of the construction industry. That section provides:

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, *attempt* to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

(emphasis added)

It is obvious that the enactment of any scheme of province-wide bargaining involves a com-

plex series of “trade-offs”, with substantial impact upon those interests which the Legislature finds must be subservient. Once the Legislature has made that assessment, it is up to the Labour Board to effectuate the purposes of the Act. For that reason, the Board has stated from the outset of this piece of legislation that it will not be restrictive in its interpretative approach when called upon to deal with a “mischief” section like 146(2). See, e.g., *Sikora Mechanical*, [1982] OLRB Rep. June 941.

19. Counsel for Lummus concedes that the word “arrangement” in subsection 146(2) substantially broadens the section, but argues that the present case does not involve the sort of “mischief” that the section was directed at. The Board, to the contrary, finds that this is precisely the sort of local “private” deal that section 146(2) is aimed at, whether during or after negotiations, or before or after a job is bid, and the concern of the employer bargaining agency in these proceedings tends to confirm that. It is not in dispute that what Lummus was seeking was a variation from the provincial agreement. Whatever the economic circumstances, an employer under the regime of province-wide bargaining simply cannot attempt to “cut his own deal”, even for a single project. The Board is not unmindful of the practical difficulties which may arise for an individual contractor in seeking to work out a special arrangement through the offices of the employer and employee bargaining agencies; but that is how, under the terms of this legislation, it clearly must be done. There is no evidence whatever that that is what the respondent had in mind in the present case. The Board accordingly finds the respondent Lummus to have acted in violation of section 146(2) of the *Labour Relations Act*, which makes it an offence to even *attempt* to work out a separate arrangement.

20. The Board accordingly declares that the respondent, Lummus, has violated section 146(2) of the *Labour Relations Act*, and directs it to cease and desist from attempting in any way to bargain for, or conclude any arrangement inconsistent with the complainant’s provincial agreement, other than through the medium of the designated employer and employee bargaining agencies.

21. The Board further declares that Lummus has engaged in a lock-out of the members of the complainant at the Port Hope job site, in contravention of sections 72 and 75 of the *Labour Relations Act*.

22. All parties are of course aware that the Board in File No. 0942-83-U, in a decision issued September 28, 1983, has made a similar determination of a lock-out in response to the complaint of the IBEW over these same events. That decision concluded as follows:

“The complainant has asked for damages in respect of this lock-out, and we are of the view that they are entitled to such relief. We remain seized of this matter in the event that the parties are unable to agree on the quantum of damages herein.”

The Board in the present case as well finds that damages will flow from the respondent’s unlawful lock-out. But, in line with the other case, the Board leaves the matter of damages to be dealt with initially by the parties. The Board will remain seized of the complaint in the event that the parties are unable to reach agreement on that issue.

1296-82-U; 0195-83-U; 0323-83-U Luciano D'Alessandro, Donato Marinaro and Robert J. S. Countryman, Complainant, v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, Respondents

Practice and Procedure – Unfair Labour Practice – Respondent not entitled to raise delay where respondent's unlawful conduct caused delay – Board finding one complainant's delay not extreme to cause refusal to hear – Delay in filing complaint and particulars to be considered in exercising remedial discretion – Board refusing to inquire into other complaint because of delay

BEFORE: R. D. Howe, Vice-Chairman, and Board Members F. W. Murray and W. F. Ruth-erford.

APPEARANCES: *Mary Portis and Luciano D'Alessandro for Luciano D'Alessandro; Dianne L. Haskett and Donato Marinaro for Donato Marinaro; Robert J. S. Countryman appearing on his own behalf; A. M. Minsky, R. D'Andrea and D. D'Andrea for the respondents.*

DECISION OF THE BOARD; October 31, 1983

1. File No. 1296-82-U is a complaint under section 89 of the *Labour Relations Act* in which Luciano D'Alessandro alleges that the respondents have contravened sections 68 and 69 of the Act in respect of certain hiring hall referrals which allegedly occurred in September of 1982. No question of delay arises in respect of that complaint, which was filed on October 13, 1982.

2. File No. 0195-83-U is a section 89 complaint in which Donato Marinaro alleges that the respondents have contravened sections 69 and 70 of the *Labour Relations Act* in respect of 46 referrals which allegedly occurred between July of 1981 and September of 1982. That complaint was filed with the Board on April 28, 1983. By letter delivered to the Board on July 4, 1983, Brian Iler, who at that time was counsel for Mr. Marinaro, filed as an additional particular to that complaint an allegation pertaining to a referral which allegedly occurred on March 1, 1983. On October 11, 1983, Mr. Marinaro's present counsel filed further particulars with the Board. Those further particulars impugn seven referrals alleged to have occurred in March and April of 1983. It is also alleged (in paragraph 3(E) of those further particulars) that Mr. Marinaro was laid off by D. W. Rankin Limited on July 7, 1981, at the direction of the respondent Rocco D'Andrea, who is the business agent of Local 1089. Counsel for the respondents contends that Mr. Marinaro's entire complaint should be dismissed on the basis of undue delay, or that, in the alternative, the Board should decline to hear portions of his complaint on that basis. Counsel for Mr. Marinaro, on the other hand, submits that the Board ought to hear the entire complaint.

3. File No. 0323-83-U is a section 89 complaint in which Robert J. S. Countryman alleges that he has been dealt with by the respondents contrary to sections 68 and 69 of the Act. In particular, he alleges that Mr. D'Andrea took his name off the "persons available for work list" in March of 1982. Counsel for the respondents also contends that Mr. Countryman's complaint, which was not filed with the Board until May 12, 1983, should be dismissed on the basis of unreasonable delay.

4. These three complaints were consolidated by the Board on August 18, 1983 (along

with three other section 89 complaints which have since been withdrawn). On the agreement of the parties, on October 17, 18, and 19, 1983, the Board heard as a preliminary matter the evidence and submissions of the parties concerning the issue of delay (in relation to File Nos. 0195-83-U and 0323-83-U) and reserved its ruling on that matter.

5. The Board has had occasion to consider the effect of delay in filing a section 89 complaint in a number of recent cases. In the *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, at paragraph 22, the Board wrote as follows:

A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

In *Sheller-Globe Canada Limited*, the Ontario Divisional Court, in a unanimous judgment dated June 28, 1983, dismissed an application for judicial review of a Board decision (reported in [1982] OLRB Rep. Jan. 113) in which the Board, after entertaining evidence and submissions with respect to delay in filing a section 89 complaint alleging a breach of section 68 of the *Labour Relations Act*, declined to inquire into the merits of the complaint in the exercise of its discretion under section 89 of the Act and, accordingly, dismissed the complaint. (See also *Chrysler Canada Limited*, [1983] OLRB Rep. Apr. 490; *Chrysler Canada Limited*, [1982] OLRB Rep. Oct. 1417; *Concrete Construction Supplies*, [1982] OLRB Rep. Oct. 1446; and *CCH Canadian Limited*, [1977] OLRB Rep. June 351.)

6. As noted above, some of the referrals which form the subject matter of Mr. Marinaro's complaint occurred almost two years before he filed his complaint with the Board, and the layoff referred to in paragraph 3(E) of the further particulars filed on October 11, 1983 occurred twenty-seven months earlier. Thus, in view of the substantial period of time which has elapsed between the occurrence of some of the events in question and the filing of the complaint (and further particulars), this is an appropriate case in which to consider the matter of delay as a threshold issue.

7. Mr. Marinaro gave extensive testimony before the Board concerning the timing of the filing of his complaint and further particulars. Although he had some difficulty recalling dates and was inclined at times during cross-examination to digress from the specific questions put to him by counsel for the respondents, we are satisfied that he was sincerely attempting, within the scope of his somewhat limited command of the English language, to truthfully and

accurately answer the questions put to him. Thus, with due allowance for those factors and for the tendency of self-interest to somewhat modify (subconsciously) the recollections of a witness concerning contentious matters, we are prepared to rely upon his testimony, which was uncontradicted by any other evidence, the respondents having elected to call no evidence concerning this aspect of the case.

8. As early as 1981, Mr. Marinaro was dissatisfied with the way in which Local 1089's hiring hall was being operated by the respondents. However, although he had heard rumours about improper referrals, he "couldn't prove anything" because the respondents would not permit him to examine the hiring hall records. Mr. Marinaro asked to see those records in November or December of 1981 but was refused access to them by Mr. D'Andrea. Although counsel for the respondents suggested to Mr. Marinaro in cross-examination that he was denied access to the hiring hall records because he wished to look at them on behalf of his son rather than on his own behalf, Mr. Marinaro steadfastly maintained that he wished to see them for his son and for himself. He further testified that he did not advise Mr. D'Andrea on whose behalf he wanted to examine the records. (In any event, it is far from apparent to the Board that a request by a member of a local to view the local's hiring hall records on behalf of another member of the local, who is his son, can legitimately be denied.) Although Mr. D'Andrea was in attendance at the hearing, he was not called to testify. Under the circumstances, we accept without hesitation or reservation Mr. Marinaro's evidence concerning his denial of access to the hiring hall records. In this regard, his experience appears to have been similar to that of other members of the Local. See the *Portiss* decision, [1983] OLRB Rep. July 1160, in which the Board wrote as follows, at paragraph 60:

Members were reportedly denied access to the out of work list and work referral book. These documents were kept behind a caged window in the hiring hall and could be scrutinized only with the permission of Mr. D'Andrea. That permission appears seldom, if ever, to have been given.

See also paragraph 11 of that decision in which the Board wrote: "It is a matter of record that up to the first day of hearing of this complaint [File No. 1278-82-U] the union refused to permit Mr. Portiss or his counsel to see any of the hiring hall records."

9. Counsel for the respondent suggested that Mr. Marinaro should have investigated his suspicions by attending at job sites to see who was working and by attending at the Union hall to see who was being referred. However, assuming without deciding that such investigative efforts might legitimately be required in some circumstances, they would not have assisted Mr. Marinaro in the present case since he would not in any event have been able to determine whether such referrals were proper or improper without access to the hiring hall records. Mr. Minsky also contended that Mr. Marinaro should have filed a section 89 complaint based upon his suspicions and used such complaint to gain access to the hiring hall records. However, the Board does not find that contention to be meritorious. The use of the Board's processes as a means of discovery in respect of allegations based upon mere suspicion is not something which the Board would desire to encourage (although it may be necessary in some circumstances, such as in some cases to which the section 89(5) "reverse onus" applies). In any event, we are not satisfied that Mr. Marinaro knew or should have known prior to November of 1982 that effective access to the hiring hall records could be obtained in that manner. Furthermore, we are not inclined to give much weight to a protestation of delay in

circumstances where, as in the present case, the inaccessibility of the information necessary to file a duly particularized complaint is created by improper conduct on the part of a party which seeks to raise the delay as a bar to hearing the complaint. (See paragraph 20 of the aforementioned *Portiss* decision in which the Board adopted a similar approach.)

10. In mid September of 1982 Mr. Marinaro became aware through personal observation that Mario Savo and Gino Iacobelli had been referred to work ahead of him even though he had registered on the out of work list ahead of them (at a time when they were employed on other jobs). In early October, Mr. Marinaro wrote to Angelo Fosco, the General President of the Labourers' International Union (the "International") to complain about those referrals. By letter dated October 20, 1982, Mr. Fosco acknowledged receipt of Mr. Marinaro's letter and advised him that it had been referred to the International's Toronto Subregional Office. That complaint was subsequently investigated by International Representative Jerry Flook who assured Mr. Marinaro that he would talk to Mr. D'Andrea about the matter. On or about November 17, 1982, Mr. D'Andrea stated that he would not discuss the matter with Mr. Flook or Mr. Marinaro because of the section 89 complaint which had been filed with the Board by Mr. Portiss. (That complaint was scheduled for hearing that day but was recessed to afford Mr. Portiss and his counsel an opportunity to review the hiring hall records.) As Mr. Flook was about to leave, Mr. Marinaro asked him what the next procedure should be in view of Mr. D'Andrea's refusal to discuss the matter. In particular, he asked Mr. Flook if he should complain again to the International or should complain to the Ontario Labour Relations Board. Mr. Flook told Mr. Marinaro that such action would not be necessary and that he would "let [him] know in a couple of days". When Mr. Flook did not contact Mr. Marinaro within that time, the latter telephoned him several times and was ultimately told to "do whatever he wanted" with respect to writing to the International or the Board. Mr. Flook also told Mr. Marinaro that the Union constitution (the "Constitution") did not cover the hiring hall. Since he was desirous of exhausting any possibility of obtaining relief through internal Union procedures before complaining to the Board, Mr. Marinaro wrote again to the General President of the International on or about December 20, 1982. (That letter included a complaint about a referral of Tony Belak, the circumstances of which had recently come to Mr. Marinaro's attention.) In late December, Mr. Marinaro received another letter from Mr. Fosco acknowledging receipt of his communication and advising him that it had been referred to the Toronto Subregional Office. Mr. Flook subsequently telephoned Mr. Marinaro's residence and left a message with Mr. Marinaro's son as Mr. Marinaro was not home at the time. Thereafter, Mr. Marinaro attempted to "phone collect" to Mr. Flook in Toronto, but did not speak with Mr. Flook as the charges for the call were refused. Ultimately, Mr. Marinaro spoke with Mr. Flook again in March and was asked repeatedly by the latter, "How much money do you want?" When Mr. Marinaro replied that he was looking for his back pay but also wanted "some justice", Mr. Flook reiterated that the International had no right to control the Local 1089 hiring hall.

11. Mr. Marinaro had become friends with Joe Portiss as a result of their common dissatisfaction with the June 1981 Local 1089 election in which they had both been unsuccessful in their bid for positions on the Local 1089 Executive Board. Together they unsuccessfully appealed that result to the International's General Executive Board. Mr. Marinaro also attempted to assist Mr. Portiss with a section 89 complaint filed with the Board by Mr. Portiss in October of 1981, which complaint was later withdrawn following discussions with a Board Officer. On October 8, 1982, following "protracted applications and appeals through the legal aid system at both the local and provincial level as well as appeals for assistance to members

of the Legislature'' (see paragraph 18 of the aforementioned *Portiss* decision), Mr. Portiss filed another section 89 complaint with the Board on October 8, 1982. When that complaint came on for hearing before another panel of the Board, the respondents, at the suggestion of the Board, provided Mr. Portiss and his counsel with access to the hiring hall records. However, when Mr. Marinaro attempted to scrutinize those records at that time, he was told by officials of Local 1089 to 'stay away'. The point in time at which Mr. Marinaro finally gained access to those records is unclear from the evidence. However, it is clear that he did not gain such access until late November of 1982 at the earliest, and may not in fact have seen those records until December of 1982 or later. When he examined copies of those records at the home of Mr. Portiss, Mr. Marinaro for the first time became aware of the 43 referrals which, in addition to the aforementioned referrals of Messrs. Savo, Iacobelli and Belak, form the subject matter of his complaint as originally filed.

12. With respect to Mr. Marinaro's letters to the General President concerning his complaints about the Savo, Iacobelli, and Belak referrals, we are of the view that he cannot be criticized for initially attempting to resolve his concerns in that fashion. Counsel for the respondents noted that Mr. Marinaro was unable to point to any language in the Constitution expressly providing for such procedure. (Neither Mr. Marinaro nor the respondents filed a copy of the Constitution with the Board.) However, we are satisfied that the presence or absence of such language is not determinative in the present case; what is important is the fact that each time Mr. Marinaro sent a letter of complaint to the General President, he received an acknowledgment of his communication and, far from being advised that the International had no constitutional jurisdiction to consider his complaints, was advised that his complaints had been referred to the International's Toronto Subregional Office. Moreover, International Representative Jerry Flook thereafter followed up on each of Mr. Marinaro's complaints and attempted to resolve them. Thus, we agree with counsel for Mr. Marinaro that her client cannot be faulted for seeking to obtain redress through internal Union procedures before filing a complaint with the Board. Nevertheless, we are also of the view that it should have been apparent to Mr. Marinaro by the end of January of 1983 at the latest that he was not going to be able to obtain effective relief through internal Union procedures. Moreover, he has not satisfied us that he acted with due diligence in his efforts to contact Mr. Flook concerning the disposition of his complaints to the International. Having regard to all the evidence and the submissions of the parties, we are satisfied that if Mr. Marinaro had proceeded with due diligence after the hiring hall records became accessible to him, he would have filed his section 89 complaint (concerning the aforementioned 46 referrals) by the end of February of 1983, if not before. However, his delay in filing has not been so extreme as to make it appropriate for the Board, in the circumstances of this case, to decline to hear his complaint on the merits.

13. Although the pertinent hiring hall documents have not been destroyed, and there is no evidence that material witnesses have become unavailable due to the passage of time, there is, nevertheless, some merit in Mr. Minsky's submission that delay in respect of a section 69 complaint can be even more prejudicial to a union than delay in respect of a section 68 complaint. Unions, such as Local 1089, are required to make hundreds of referrals each year in the administration of their hiring halls. Although a union's hiring hall records can certainly record the actual referrals which have been made, the Board has recognized that a business agent needs 'latitude for discretion in day-to-day decisions ... for the administration of a fractious body of members in a hiring hall' (see the Board's decision in the *Portiss* case, *supra*, at paragraph 65). It may not be practicable for a business agent to record in such documents full details of all of the factors which he considered in exercising such discretion in regard

to individual referrals, and his recollection of such details may well fade with the passage of time. However, we are satisfied that any prejudice to the respondents which Mr. Marinaro's delay may have occasioned can be adequately dealt with by the Board in the exercise of its remedial discretion under section 89 of the Act in determining the amount of compensation, if any, to be paid to Mr. Marinaro by the respondents. Similar considerations apply to the delay by Mr. Marinaro (or by Mr. Iler, who was then his legal counsel) in filing, by letter dated July 4, 1983, the additional particular to the complaint in respect of a referral which allegedly occurred on March 1, 1983.

14. While there has been several months of undue delay on the part of Mr. Marinaro (or his agent, Mr. Iler) in failing to file or cause to be filed, prior to October 11, 1983, the allegations contained in paragraph 3(D) of his "further particulars", which allegations pertain to seven referrals that allegedly occurred in March and April of 1983, we are satisfied that any prejudice to the respondents which may have been caused by such delay can also be adequately dealt with by the Board in assessing any compensation which might be awarded in respect of those referrals.

15. Paragraph 3(E) of the "further particulars" filed on October 11, 1983 alleges that Mr. Marinaro was laid off from work at D. W. Rankin Limited on July 7, 1981, without justification, at the direction of Mr. D'Andrea. Although that subparagraph pertains to an event which allegedly occurred 27 months prior to the filing of that allegation with the Board, we are satisfied that the information which led to its filing first came to the attention of Mr. Marinaro in late July or early August of 1983 when Clemente Cicchini, a member of the Executive Board of Local 1089, revealed to Mr. Marinaro that Mr. D'Andrea had stated, in the presence of Mr. Cicchini and some other Executive Board members, that after the aforementioned Executive Board election, Mr. Marinaro and the others who were opposing them in the election would have to be laid off any job that they came to. (It is unnecessary at this stage in the proceedings to make any finding as to whether or not Mr. D'Andrea actually made that statement. It is sufficient to find that Mr. Cicchini told Mr. Marinaro that Mr. D'Andrea did so, and that Mr. Marinaro, in reliance upon that information, instructed his counsel to add to the complaint the allegation which ultimately became paragraph 3(E) of the further particulars.) Nor can it be said that Mr. Marinaro should have been aware of the information which gave rise to that allegation prior to late July or early August of 1983. Although Mr. Marinaro had earlier approached Mr. Cicchini in an attempt to obtain information which might assist him in his quest for hiring hall justice, Mr. Cicchini did not divulge that information at that time. We find no merit in Mr. Minsky's submission that Mr. Marinaro should have filed a section 89 complaint at that time on the basis of unconfirmed suspicions which he harboured (but, not unreasonably, felt incapable of proving). Moreover, we note that unlike Mr. Marinaro's other allegations, his paragraph 3(E) allegation does not pertain to one of many referrals, but rather to an extraordinary event which, if it occurred, would almost certainly be within Mr. D'Andrea's recollection. Thus, while there has been some undue delay on the part of Mr. Marinaro (or his agent, Mr. Iler) in failing to file the allegation contained in paragraph 3(E) prior to October 11, 1983, that period of delay (between August and October of 1983) is not so extreme as to prompt the Board to decline to hear that serious allegation. Therefore, having regard to all the circumstances, we are satisfied that any prejudice which that delay may cause to the respondents can be adequately dealt with by the Board in the exercise of our remedial discretion under section 89 in determining the amount of compensation, if any, to be awarded to Mr. Marinaro in the event that he succeeds in proving that allegation.

16. The complaint of Robert J. S. Countryman (in File No. 0323-83-U) is that in March of 1982 Mr. D'Andrea took Mr. Countryman's name off the "persons available for work list". Mr. Countryman registered at the Local 1089 hiring hall on December 15, 1981 and was given #301 on that list. On March 8, 1982, the Union called Mr. Countryman's residence for the purpose of referring him to a job. However, Mr. Countryman was not home at the time of the call as he was working for National Construction as a welder at Union Carbide. Since Mr. Countryman was unavailable for work, his name and number were struck from the list that day. Mr. Countryman told the Board that he "presumed" that his name would immediately be placed at the bottom of the list, but offered no credible explanation for the basis of that presumption. In actual fact, in accordance with what the Board described in paragraphs 14 and 15 of the aforementioned *Portiss* decision as the "accepted procedures of the hiring hall", Mr. Countryman's name was removed from the list and, because he did not request that his name be returned to the list, Mr. Countryman's name was not placed on the bottom of the list at that time, or at any other time prior to April of 1983 when he approached the secretary at the Union hall, asked what his number was, and was told that he was not on the list. Although Mr. Countryman initially told the Board that he checked the numbers on the referrals board from time to time when he went to the Union hall to pay his dues every two or three months between March of 1982 and April of 1983, after being confronted with the fact that he could not have meaningfully checked the board as he had not inquired what his new number was, he ultimately conceded, after considerable evasion, that he had not checked the board during that period. Having regard to all the circumstances, including Mr. Countryman's demeanour while testifying before the Board and the contradictions and inconsistencies in his evidence, the Board finds that Mr. Countryman has not established that he exercised due diligence in filing his complaint with the Board. Moreover, we find that he made no effort whatsoever between March of 1982 and April of 1983 to determine whether he had in fact been placed on the bottom of the list on March 8, 1982, and was not concerned whether or not he was on the list during that period, having obtained employment through Plumbers' Local 663 as a "permit" holder, which relatively long term employment he found to be more satisfactory than the shorter term jobs to which he had previously been referred by Local 1089. If he had been at all concerned about whether or not his name was on the list, he would undoubtedly have telephoned or attended at the Local 1089 hall long before April of 1983 to confirm that he was on the list by ascertaining what his new number was. In the absence of any such inquiry, which is certainly not unduly onerous in the circumstances, we find that he has not established any exceptional circumstances, overriding public policy considerations, or other considerations which would prompt the Board to hear his complaint on the merits notwithstanding the extensive delay which occurred between the time when he should have known that his name was not on the list, and the time he filed his complaint with the Board. Moreover, if we were to hear the complaint and Mr. Countryman established that the respondents' failure to place his name at the bottom of the list on March 8, 1982 was a contravention of the Act, under the circumstances we would not, in the exercise of our remedial discretion under section 89 of the Act, be prepared to award him any compensation in respect of that breach. Thus, no useful purpose would be served in hearing the merits of Mr. Countryman's complaint. Accordingly, the Board, in the exercise of its discretion under section 89 of the *Labour Relations Act*, hereby dismisses Mr. Countryman's complaint.

17. For the foregoing reasons, the complaint in File No. 0323-83-U is dismissed. File Nos. 1296-82-U and 0195-83-U are hereby referred to the Registrar to be listed for continuation of hearing.

1723-82-R London & District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, Applicant, v. **Price Waterhouse Limited** and Canadian Imperial Bank of Commerce, Respondents

Related Employer – Sale of a Business – Creditor bank appointing receiver and manager under debenture instrument – Receiver honouring terms of collective agreement and running nursing home until suitable purchaser found – Whether bank and/or receiver successor employers – Whether responsible for past breaches of agreement by nursing home – Conditions for related employer declaration not made out

BEFORE: R. A. Furness, Vice-Chairman, and Board Members B. L. Armstrong and E. J. Brady.

DECISION OF THE BOARD; October 24, 1983

1. In a decision dated July 8, 1983, the Board dismissed the application for relief under sections 1(4) and 63 of the *Labour Relations Act*. In that decision the Board stated that reasons would be given at a later date. These reasons are now set forth.

2. It was the position of the applicant that a collective agreement was entered into between the applicant and Willson Nursing Homes Limited ("Willson") on June 9, 1982, and that as a result of a sale of a business by Willson to Price Waterhouse Limited ("Price") and to the Canadian Imperial Bank of Commerce ("CIBC") the respondents were bound by the collective agreement and were required to bargain with the applicant with a view to making a new collective agreement. The applicant alleged that on or about November 23, 1982, Price was appointed receiver and manager of Willson by the CIBC and that Price and CIBC have continued to run the business of Willson and to employ members of the applicant. Subsequently, the applicant notified the Board that it wished to make representations as to the application of section 1(4) of the Act.

3. Willson sold its nursing home business on or about May 12, 1981, to Romi Nursing Homes Ltd. ("Romi"). Romi had previously been incorporated on March 31, 1981, and is the present operator of the business being carried on as a nursing home in St. Thomas. In a general security agreement dated November 9, 1982, Romi charged in favour of and granted to the CIBC a security interest in all of the undertaking property and assets of Romi. In a debenture dated May 11, 1981, Romi, together with Mirdem Nursing Homes Limited ("Mirdem"), charged to and in favour of United Dominions Investments Limited ("United") all of Romi's undertaking, property and assets to secure the sum of seven hundred and fifty thousand dollars. Mirdem operates a nursing home in Hamilton and is of no significance in this application. In an agreement dated October 1, 1982, United assigned the debenture to the CIBC and all of the monies secured thereunder. On November 12, 1982, the CIBC duly demanded from Romi payment of Romi's indebtedness to the CIBC as secured by the general security agreement and debenture. Romi failed to make the payments so demanded and on November 22, 1982, the CIBC appointed Price as receiver and manager of Romi's undertaking, property and assets pursuant to the terms of the debenture. Price has also taken possession of Romi's assets, including the business.

4. Price has continued to run the business and has retained all of the employees pre-

viously employed by Romi at the wage scale set forth in the collective agreement at that time and has abided by the terms of the collective agreement during the period of its operation of the business. Price accepts no responsibility for any breaches which Romi may have committed prior to November 22, 1982. Price and the CIBC have denied that they are successor employers within the meaning of section 63 of the Act, and further deny that the appointment of Price by the CIBC as receiver and manager of Romi's undertakings, property and assets, constitute a sale within the meaning of section 63 of the Act. At the hearing, Price and the CIBC further denied that the provisions of section 1(4) were applicable to the series of commercial transactions which form the background to this application.

5. The licensee of the Nursing Home under the *Nursing Homes Act* is Romi and the licence was renewed on May 12, 1982. There was general concern by Romi and by the Ministry of Health about the manner in which the Nursing Home was being operated and on July 27, 1982, Romi entered into an agreement with 430029 Ontario Limited carrying on business as Krizanc Consulting Services to provide administrative and support services to the Nursing Home. The administrator of the Home on November 22, 1982, was replaced by a Mr. Cranwell who thereafter took his instructions from Price. Price, as the receiver manager, looks after all receipts and disbursements for the Home and Krizanc and Mr. Cranwell look after the day to day administration of the Nursing Home. The concerns over the adequacy of the care which put the licence in jeopardy are still the subject of monitoring by the Ministry of Health. The debenture contains the usual provision whereby the acts of Price as receiver and manager are the acts of Romi. The employees of Romi were advised of the presence of Price and when the last salary cheques for the employees were not honoured by the Bank, they were replaced by Price, not as a matter of requirement under the law, in the view of Price, but as a gesture to the employees. Price has also honoured Romi's duty to bargain to make a new collective agreement and has performed this duty through Mr. Cranwell, the administrator. A conciliation officer was appointed and the differences of the parties were submitted to arbitration under the *Hospital Labour Disputes Arbitration Act*. Two grievances were filed under the collective agreement since the appointment of Price.

6. It is agreed that the CIBC has merely acted in order to protect its security by virtue of the debenture and general security agreement and that the appointment of Price was for no improper reason. CIBC is faced with various alternatives in realizing its security. It may elect to sell the assets of Romi, or it may elect to operate Romi through the receiver/manager as a going concern and then endeavour to find a suitable purchaser for the Nursing Home, bearing in mind that the consent of the Ministry of Health is necessary for the transfer of the licence. It appears that the CIBC has chosen the latter route and is running the business until a suitable purchaser can be found.

7. The applicant urged the Board to find that there was a sale of a business within the meaning of section 63(1)(b) of the Act and argued that the Board should look to see who has the effective control of the running of the Nursing Home. It was argued that while Romi and Willson continued to exist, Willson had passed out of the picture and that Romi has no effective control over its assets or in running the Nursing Home. While the applicant agreed that the CIBC was not in the business of running a Nursing Home, and while it accepted that the CIBC was merely trying to realize on its security, it felt that the fact that there was no effective limit on how long the CIBC may run the Nursing Home, required the Board to find that the CIBC and Price were the successor employers in the context of labour relations. The applicant argued that the agency relationship which is said to arise under the debenture,

whereby the agent has more power than the principal in commercial law, can have no effect in labour relations law. The Board was asked to look at the substance and not the form of the nature of the relationship between Romi, Price and the CIBC. Acknowledging that the receiver/manager was appointed by instrument and not by the court and is, therefore, an agent of the company, the applicant saw no difficulty in regarding both the CIBC and Price as the successor employers. The applicant posed the question of whether there had been a disposition of the assets and, if so, who had control over the hiring, firing, discipline, expenditures and existing contracts, customer lists and good will. It was urged that there had been a *de facto* disposition of the business and the assets of Romi.

8. In the alternative, it was the position of the applicant that the successor employer is the CIBC and that the receiver/manager, Price, is its agent. In the further alternative, it was the applicant's position that if the CIBC is not the successor employer then Price ought to be considered the successor employer. With respect to the requests for relief under section 1(4) of the Act, the applicant argued that Romi was not making any of the decisions and that they remain merely nominal owners who may have, at the most, certain revisionary rights. Since the decisions were made by Price, there was, in effect, a common ownership, control of employees and a representation to the public as a single integrated enterprise. It was also argued that another related employer could be the CIBC, which has the ultimate control of the destiny of the Nursing Home. The applicant argued that the CIBC and Price between them were making all of the effective decisions in regards to labour relations.

9. In opposing the requests for relief under sections 1(4) and 63, the CIBC and Price viewed their position in this application as being asked to guarantee wages because money had been loaned in order to promote a business. The respondents argue that the business of Romi continued to exist and that it had not been disposed of, and that the action before the Board was premature. It was the position of the respondents that the present state of the Nursing Home was fairly to be considered as a process of managing a business which had been previously poorly managed and that the action of managing the business was solely to protect the security of the CIBC. The respondents argued that the applicant may bargain, and indeed was bargaining, and that the applicant's position was unrealistic in that it did not take into account the precarious financial position of Romi. The role of the receiver/manager was portrayed as requiring flexibility in a background where final decisions may not always be possible.

10. The respondents characterized the applicant's position as trying to compel the respondents to make good past obligations under the collective agreement before the appointment of Price on November 22, 1982. In the view of the respondents, the applicant was trying to put itself in a special position amongst creditors. The CIBC referred to section 75 of the *Bank Act*, wherein banks are prohibited from carrying on a trade or a business. The CIBC characterized the introduction of a receiver/manager as a means of insulating the Bank from the prohibitions contained in section 75. It was strongly argued by the respondents that there was nothing in the way of a disposition of a business or assets on the material before the Board. The respondents emphasized that the applicant had not been able to point to any instance where there had been a change in the ownership of any of the property or resources of Romi. The CIBC argued that the appointment of a receiver/manager by instrument in an attempt to preserve the business and find a new purchaser was far better than the prospect of bankruptcy where there would be an immediate loss of jobs.

11. The respondents argued that the Board ought not to exercise its discretion under section 1(4) of the Act, because this was not a situation where there had been any shifting or juggling of employees and where the applicant knew with whom it was dealing. The respondents emphasized that the present intercession of the CIBC through Price in the business of Romi was caused solely by the financial circumstances of Romi. The respondents further argued that none of the prerequisites for the operation of section 1(4) had been established before the Board.

12. Price was clearly the agent of Romi when it entered into control of the Home on November 22, 1982. The Board does not agree with the criticism of the principal and agency relationship advanced by the applicant. There are valid reasons in commercial law for incorporating the provision in the debenture whereby the receiver/manager is the agent of the debtor company. It is, of course, not always possible for a receiver/manager to secure the co-operation of the officers of a debtor corporation. The principal and agent relationship which exists between Romi and Price is entirely realistic in the context of commercial law. Price managed the Nursing Home for the benefit of Romi and, in our view, the application under section 63 is premature.

13. Price was appointed receiver and manager by means of a private appointment as opposed to a court appointed receiver/manager. This appointment, sometimes referred to as an instrument appointment, has previously been considered by the Board in *Price-Waterhouse Limited*, [1979] OLRB Rep. Jan. 50, where the Board stated at page 51:

7. The Board considers that this application has been prematurely brought. In order for a sale of a business within the meaning of section 55 [now section 63] to occur, it is necessary that there be a disposition from, in this case, the employer that is party to the collective agreement to another person. An examination of the relationship existing between the company and the respondents reveals that this has not yet occurred. What has happened is that a receiver has been appointed to manage the business – so that the Bank which holds a first charge on the assets and undertaking may enforce its security. Although the receiver is carrying on the business for the benefit of the Bank to which it owes a fiduciary duty, its actions are those of the company which retains the legal and equitable ownership of the assets. Under the terms of the debenture constituting the receiver as the agent of the company, the company is “solely responsible for the receiver’s acts or defaults and for its remuneration and the expenses”. In these circumstances, it cannot be said that a disposition within the meaning of section 55 [now section 63] has occurred.

14. It is clear that in this application the applicant still holds bargaining rights and is in a position to negotiate a collective agreement. The applicant would, of course, prefer to negotiate a collective agreement with one or two solvent entities, such as the CIBC or Price. However, the business of running the Nursing Home has not extinguished the bargaining rights, and as long as the business of running the Nursing Home continues to function the obligations between an employer and a trade union still exist. It is quite clear that Price has honoured the terms of the relevant collective agreement since it has been appointed receiver and manager. Since there has been no sale or disposition within the meaning of section 63, it therefore follows that this application under section 63 is premature and must be dismissed.

15. The criteria adopted by the Board with respect to the application of section 1(4) of the Act have been set forth in *Walters Lithographing Company Limited*, [1971] OLRB Rep. July 406 at pages 412-414. In our view, the applicant has not established any of the criteria set forth in that decision. There has been no showing of common ownership or control. There has been no indication of a representation to the public of a single enterprise and no evidence that the supervision and labour relations fall under common control. This is not a case where an employer is moving around employees to the detriment of a trade union. The employment relationship is known by the applicant, the identity and nature of the principal and agent relationship between Romi and Price is known to the applicant and the applicant has been bargaining with Romi through Mr. Cranwell, the administrator, who is controlled by Price. Section 1(4) is not a means for collecting Romi's uncollectable collective agreement debts from its solvent creditor, the CIBC. In a recent decision of the Board in *Total Marketing Incorporated*, [1983] OLRB Rep. April 616, the Board was asked by a trade union to declare that the parent company of an insolvent subsidiary with which it had undischarged collective agreement obligations, was a related employer for the purposes of section 1(4). That application had been brought solely for the purpose of realizing otherwise uncollectable claims against a related company which was solvent. In declining to exercise its discretion to make a declaration pursuant to section 1(4) of the Act, the Board made the following remarks:

4. It is clear that [the insolvent employer] has ceased operations and that the work which it performed is no longer being done. There has been no transfer of work, and in that sense, no undermining or erosion of the applicant's bargaining rights. If it appeared on the material before us that the respondent had spun off a similar company to do identical work, the case might be more compelling for relief, whether by way of declaration of successorship under section 63 of the Act or by the application of section 1(4). In those circumstances, the Board could, by the operation of section 1(4) pierce the corporate veil in the interests of protecting the bargaining rights (see, *E. G., Devon Studio*, [1980] OLRB Rep. July 961). Those facts are not shown in the instant case. The purpose of section 1(4) of the Act is to preserve bargaining rights, it is not intended to give a party to a collective agreement the right to a "deep pocket" recovery of an unsatisfied debt against a related corporation.

(See, also, *Chandel Fashions*, [1982] OLRB Rep. June 828 at pages 848-849.)

16. Clearly the facts of this case do not indicate an erosion of bargaining rights by means of a scheme to defeat those bargaining rights. The facts of this application establish a situation where the financial position of Romi, the operator of the Nursing Home, has called for a creditor to take steps to protect its security. The applicant in all of the circumstances of this case has singularly failed to establish its entitlement to any relief under section 1(4) of the Act and its application under that section is dismissed.

0968-83-R International Union of Operating Engineers, Local 793, Applicant, v. W. Rourke Ltd., Respondent

Constitutional Law – Construction Industry – Respondent’s employees laying pipes for companies clearly in federal jurisdiction – Not doing any repair work or hooking up – Whether function integral to federal operation – Board finding work within provincial jurisdiction – ICI sector not encompassing work done in public domain

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members E. J. Brady and H. Kobryn.

APPEARANCES: *E. A. Ford and L. Budge for the applicant; T. C. Barber, D. Rourke, H. Kack and R. Dubeau for the respondent.*

DECISION OF THE BOARD; October 11, 1983

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

2. At the outset of the hearing into the application, counsel for the respondent challenged the jurisdiction of the Board to consider the application. According to counsel, for labour relations purposes the respondent comes within federal as opposed to provincial jurisdiction.

3. The respondent is a construction company headquartered in the City of Quebec. Although most of the respondent’s work is performed in the Province of Quebec, it is also active in the city of Ottawa and surrounding areas in the Province of Ontario. Fully, ninety per cent of the respondent’s work in Ontario is performed pursuant to a contract with Bell Canada, a firm both parties agree is a federal work or undertaking whose employees come within federal jurisdiction for labour relations purposes. Approximately half of the respondent’s work for Bell Canada involves trenching and the installation of new telephone cables. The cables are actually “hooked up” to Bell Canada’s existing lines by Bell Canada craft employees. The other half of the respondent’s work for Bell Canada is related to the repair of existing underground cables. Generally the respondent’s employees do no more than expose the cable so as to enable Bell Canada employees to perform the actual repair work. On occasion, the respondent’s employees do remove lengths of old cable, and then install new replacement cable. Before the old cable is removed, however, it is first disconnected by Bell Canada employees, and it is Bell Canada employees who later hook the new cable into the Bell Canada system.

4. Approximately ten per cent of the respondent’s work in Ontario is performed for two cable television companies and for Ottawa Hydro. This work involves laying conduit and underground cable, with the procedures apparently being similar to those involved with the Bell Canada work. The respondent was not challenged when it contended that the two cable television companies fall under the regulatory control of the federal government, although it acknowledged that Ottawa Hydro does come within provincial jurisdiction.

5. The position of the respondent is that the work it performs is an integral part of

the operations of Bell Canada and the two cable firms, and accordingly, for labour relations matters it also comes within federal jurisdiction. At the hearing, the Board orally rejected this contention. As opposed to Bell Canada and the cable firms, the respondent is neither in the inter-provincial telephone business nor in the cable television business. It is a construction company, and in our view, the federal government does not have jurisdiction over labour relations matters affecting it.

6. One of the first principles of Canadian Constitutional Law is that the Federal Government has no general jurisdiction over labour relations, but rather such general jurisdiction lies with the provincial legislatures. See: *Toronto Electric Commissioners v. Snider* (1925) A.C. 396. Parliament does, however, have authority over labour relations where such authority is an integral element of its primary competence over some other federal subject. See: *In the Matter of a Reference as to the Validity of the Industrial Relations and Disputes Investigation Act* (1955) S.C.R. 529 ('the Stevedoring case'). The Supreme Court of Canada dealt with the constitutional status of construction companies in *Construction Montcalm Inc. v. The Minimum Wage Commission* 79 C.L.L.C. ¶14,190. The employer in that case was a construction company engaged in building the runways at Mirabel Airport in the Province of Quebec. In response to a claim by provincial authorities that Quebec's minimum wage laws and regulations were applicable to its employees, the employer submitted that Parliament's exclusive jurisdiction over aeronautics meant that labour relations matters affecting its employees came under federal jurisdiction. Beetz J., on behalf of a majority of the Court, rejected that submission as follows:

"The construction of an airport, it was argued is as much a matter for exclusive federal control as the construction of a federal railway.

In my view, the main submission is not supported by the principles enunciated above: it does not meet the test set out in the *Stevedoring case* (1955) S.C.R. 529) according to which Parliament has no authority over labour relations except insofar as such authority is an integral element of its primary jurisdiction over some other matter; furthermore, it implicitly but clearly ignores the requirement of the *Agence Maritime* and *Letter Carriers'* cases that an undertaking, service or business be not characterized as a federal or provincial one on account of casual factors.

The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern... This is why decisions of this type are not subject to municipal regulation or permission... Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways, and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and, therefore, upon its suitability for the purposes of aeronautics. But the mode or manner of carrying out the same decisions

in the act of constructing an airport stand on a different footing. Thus, the requirement that workers wear a protective helmet on all construction sites including the construction site of a new airport has everything to do with construction and with provincial safety regulations and nothing to do with aeronautics. See *Regina v. Beaver Foundations Ltd.* (1968) 69 D.L.R. 649 and *Regina v. Concrete Column Clamps (1961) Ltd., Regina v. Louis Donolo Inc.* (1972) 1 O.R. 42. See also *Re United Association of Journeymen, etc., Local 496 and Vipond Automatic Sprinkler Co. Ltd.* (1976) 67 D.L.R. (3d) 381, where Cavanagh J. of the Alberta Supreme Court held that “the fact of construction of a building called an air terminal does not...show that the construction is connected with aeronautics” and that while an aerodrome is a federal work, employees constructing such a building are subject to provincial labour relations. In my opinion what wages shall be paid by an independent contractor like Montcalm to his employees engaged in the construction of runways is a matter so far removed from aerial navigation or from the operation of an airport that it cannot be said that the power to regulate this matter forms an integral part of primary federal competence over aeronautics or is related to the operation of a federal work, undertaking, service or business

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In submitting that it should have been treated as a federal undertaking for the purposes of its labour relations while it was doing construction work on the runways of Mirabel, Montcalm postulates that the decisive factor to be taken into consideration is the one work which it happened to be constructing at the relevant time rather than the nature of its business as a going concern. What is implied, in other words, is that the nature of a construction undertaking varies with the character of each construction project or construction site or that there are as many construction undertakings as there are construction projects or construction sites. The consequences of such a proposition are far reaching and, in my view, untenable: constitutional authority over the labour relations of the whole construction industry would vary with the character of each construction project. This would produce great confusion. For instance, a worker whose job it is to pour cement would from day-to-day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he pours cement one day on a runway and the other on a provincial highway. I cannot be persuaded that the Constitution was meant to apply in such a disintegrating fashion.

To accept Montcalm’s submission would be to disregard the elements of continuity which are to be found in construction undertakings and to focus on casual or temporary factors, contrary to the *Agence Maritime and Letter Carriers’* decisions. Building contractors and their employees frequently work successively or simultaneously on several projects which have little or nothing in common. They may be doing construction work on a runway, on a highway, on sidewalks, on a yard, for the public sec-

tor, federal or provincial, or for the private sector. One does not say of them that they are in the business of building runways because for a while they happen to be building a runway and that they enter into the business of building highways because they thereafter begin to do construction work on a section of a provincial turnpike. Their ordinary business is the business of building. What they build is accidental. And there is nothing specifically federal about their ordinary business.”

7. A case similar in certain respects to the one now before us came before the Saskatchewan Court of Queen’s Bench in *Henuset Rentals Ltd. v. United Assoc. Journeymen and Apprentices et al*, 79 CLLC ¶14,194. In that case, it was argued that the Saskatchewan Labour Relations Board had erred in deciding that it had jurisdiction to certify a union to represent employees of a firm engaged in the construction of an interprovincial pipeline. It was the employer’s position that the construction work formed an integral part of an interprovincial undertaking and, hence, came within federal jurisdiction. The Court, relying on the Supreme Court of Canada decision in *Montcalm Construction*, rejected this contention, and concluded that while the operation of an interprovincial pipeline comes within federal jurisdiction, its construction does not. We would also refer to the decision of the Federal Court of Appeal in *Canada Air Line Employees’ v. Wardair Canada (1975) Ltd. et al* [1974] 2 F.C. 91, where it is stated:

“A particular activity may be reasonably incidental to the operation of a federal work, undertaking or business without being an essential component of such operation. For example, an interprovincial railway may have its own laundry facilities or its own arrangement for preparing food for passengers, or, alternatively, it may send its dirty linen to an outside laundry or buy prepared food. Generally speaking, where such an activity is carried on by the operator of the federal work, undertaking or business as an integral part thereof, it is indeed a part of the operation of the federal work, undertaking or business. Where, however, the operator of the federal work, undertaking or business carries on the operation thereof by paying ordinary local businessmen for performing such services or for supplying such commodities, the business of the person performing the service or preparing the commodities does not thereby automatically become transformed into a business subject to federal regulation. Compare the decision of the Supreme Court of Canada in the *Construction Montcalm* case (1979) 25 N.R. 1, that was delivered last December.

8. On the basis of the above noted cases, we tend to view that if the work in question was being performed by direct hire employees of Bell Canada and the two cable companies as an integral part of their businesses, then the work would come under federal jurisdiction. However, Bell Canada and the cable companies are not performing the work themselves but have instead contracted with the respondent to perform it. There is nothing especially “federal” about the work which the respondent performs, especially since it is not involved in hooking up cables to existing lines. The result might be different if the respondent’s employees actually did maintenance and repair work on existing Bell Canada telephone lines. Such work is, however, performed by Bell Canada employees, the respondent’s employees doing no more than exposing the cables. While the respondent’s employees do at times replace lengths of

existing cable, it is Bell Canada employees who disconnect the old cable and then later connect the new cable to the Bell Canada system. We view all of the work performed by the respondent's employees as the type of construction work covered by the reasoning of the Supreme Court of Canada in *Montcalm Construction*; and accordingly, conclude that the employees come within provincial jurisdiction for labour relations purposes.

9. At the hearing the applicant requested that the bargaining unit be described in terms of all unrepresented trades in the employ of the respondent on the date of the making of the application, exclusive of those employed in the industrial, commercial and institutional sector (the 'ICI sector'). On the date of the filing of the application, the great majority of the respondent's employees were construction labourers, although it also employed a number of carpenters, truck drivers and equipment operators. For its part, the respondent contended that all of its employees were employed in the ICI Sector.

10. The material before us indicates that on the date of the filing of the application, all of the respondent's employees in the Ottawa area were laying new and replacement telephone cables under municipal streets for Bell Canada. The respondent does not install the connections between Bell telephone cables and individual premises, and accordingly, except for the occasional right of way, its employees generally do not go onto private property.

11. The only reference in the Act to the various sectors of the construction industry is in section 117(e), which provides as follows:

“‘sector’ means a division of the construction industry as determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and watermains sector, the roads sector, the heavy engineering sector, the pipeline sector and the electrical power systems sector.”

12. The applicant contends that the work being performed by the respondent's employees is similar to work in the sewers and watermains sector, and accordingly, the Board should conclude that the work falls within that sector. As an alternative submission, the applicant contends that the work should be viewed as coming within the pipeline or electrical power systems sectors. The respondent's answer to these submissions is that on the application date its employees were not engaged in laying sewers, watermains, pipelines or electrical cables. The respondent characterizes the telephone cables that its employees were installing as part of the facilities utilized by Bell Canada in furthering its commercial operations, and submits that the work should be viewed as coming within the ICI sector.

13. It is to be noted that the Act does not contain a definition of the term “industrial, commercial and institutional sector”. However, in our experience, the term is not generally applied to work on the public domain and, in particular, not to work performed in connection with public roads. In this regard, section 117(e) of the Act makes it clear that road construction, as well as the construction of sewers and watermains which frequently run under roads, are not part of the ICI sector. In the *Underground Services Limited* case [1981] OLRB Rep. July 1012 the Board concluded that repair work on the columns of the elevated Gardiner Expressway in Toronto did not come within the ICI sector. We believe we can also take notice of the fact that work similar to that being performed by the respondent is frequently performed by firms referred to as utility contractors, and that these contractors have entered into agree-

ments other than the provincial ICI agreements. Taking all of these considerations into account, we are of the view that the work in question does not come within the ICI sector. Given the manner in which the sector issue has arisen in this case, there is no need for us to reach any definitive conclusion as to what sector the work does come within, whether it be one of the sectors enumerated in section 117(e), or perhaps another sector not there referred to. It is sufficient for these proceedings that we find that the work does not come within the ICI sector.

14. Having regard to the above, and the provisions of section 6(1) of the Act, the Board finds that all construction labourers, carpenters, truckdrivers and all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

15. The Board is satisfied that on the basis of all the evidence before it not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 15, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit as of the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

17. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

18. The matter is referred to the Registrar.

0820-83-M SNC/FW Ltd., Applicant, v. Local Union 128 International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Respondent

Construction Industry Grievance – Employee demanding payment for fellow employees for wrongful work assignment – Board finding employee played leadership role in unlawful strike – Collective agreement requiring employee as steward to assist employer in enforcing collective agreement – Board refusing to substitute penalty of discharge in circumstances

BEFORE: D. E. Franks, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

APPEARANCES: *G. Grossman and D. Butt for the applicant; Alex J. Ahee, Bob MacDonald and Matt Bakker for the respondent.*

DECISION OF THE BOARD; October 21, 1983

1. This is the referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act* by the applicant employer.

2. The grievance referred to the Board is a grievance filed by the respondent trade union concerning the termination of Mr. Ken Grant on June 27, 1983 contrary to the provisions of the collective agreement. The applicant employer denied the grievance and in turn referred the grievance to the Ontario Labour Relations Board. The reason given for the termination of Mr. Grant is as follows:

“Discharged for refusal to work, and for counselling, and participating in an unlawful strike on June 25th, 1983 contrary to the provisions of Article 5 of the Collective Agreement between The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmith’s, Forgers and Helpers and the Boilermaker Contractors Association.”

The position taken by the employer is that Mr. Grant played a leadership role in a walkout which occurred on the weekend of June 25th and 26th, 1983. The position taken by the trade union is that Mr. Grant was simply a “go between” or messenger for certain demands by its membership who it is admitted participated in an illegal strike.

3. It is clear that on the weekend of June 25th and 26th some thirty boilermakers were scheduled for a weekend of overtime work. On the Saturday morning at 7:00 a.m. it appears that the boilermakers on the job site were upset because of a work assignment which had occurred on the Friday afternoon. The work involved concerned the moving of certain mats or equipment pads. This work apparently had been originally assigned to the Boilermakers, however, it was also required that the work be done by the end of the workday on Friday in order to facilitate certain other work on the weekend. It appeared that towards the end of the day the boilermakers might be unable to perform the work, and the work was apparently assigned to ironworkers, who indeed performed the work. Mr. Grant, the boilermaker steward, had left the job site before this change in assignment had occurred on Friday. When he arrived on Saturday the boilermakers were upset that the ironworkers were doing what they perceived to be their work. The evidence of Grant is, and there is no evidence to contradict

it, that the men were apparently ready to walk off the job when he arrived on Saturday morning. Indeed, it appears that by eight o'clock on Saturday morning all of the Boilermakers left the job site, thus, participating in an unlawful strike.

4. As frequently occurs in cases involving unlawful strikes, the critical series of events took place within approximately the half hour period from 7:15 a.m. to 7:45 a.m. Events are happening very rapidly and they are usually emotionally charged. It is not surprising, therefore, that accounts, and more importantly perceptions of events, vary from witness to witness. It, therefore, falls to this Board to determine which perceptions of events will be accepted and which rejected, and that in turn determines the outcome of the grievance.

5. The evidence of Thomas Johnson, the area superintendent for the employer on the project, was that at about 7:20 in the morning he was with the Boilermaker general foreman, Dave Van Sicle, in Johnson's office. At that time, Ken Grant, the boilermaker job steward, came into the office and asked if he could discuss the "problem" of the previous day. That is, the dispute over the assignment of the mats.

6. Johnson's version is that Grant's opening statement was to the effect that if the Boilermakers didn't get overtime pay for the previous day, then they wouldn't work. Johnson viewed this an ultimatum by Grant. He explained to Grant that he didn't have the authority to make such a monetary settlement, although Johnson was the senior management representative on the job site on that date. He explained that that could only be done on Monday with the appropriate level of management. He further asked Grant and Van Sicle to convey this message and ask the tradesmen to go to work. It appears that at about 7:45 Grant and Van Sicle returned and informed Johnson that the men were not going to work, they were going home. It was Johnson's interpretation of this conversation with Grant, that Grant was acting as spokesman for the boilermakers and that in making the demand was in effect delivering an ultimatum that payment be made or the men would walk off the job.

7. The grievor, Ken Grant's version of these events is quite the opposite. According to Grant he arrived on the job site and discovered that the men were upset about the change in assignment on the previous day. His intention in going to see Johnson was to simply convey that message. He admits that the two hour payment for the improper assignment was his idea, but insists that he proposed this as a solution to the problem of the imminent strike by the boilermakers. The evidence of Grant and Van Sicle is that when they went back to the men without anything, the men walked out of their own accord. Indeed, Van Sicle admits that he in effect precipitated the men leaving the job by saying they either had to "get to work or go home, they weren't being paid to sit around doing nothing". According to Grant's version of the events and the respondent trade union's view of the events, Grant was simply acting as a messenger conveying the position of the tradesmen to the employer.

8. We are of the view that we cannot accept Grant's version of the events. Of critical importance in interpreting these events is the evidence of one of the boilermaker foremen on the job site on that date. He admittedly was not at the first meeting between Grant and the Boilermakers but he was at the second meeting when Grant and Van Sicle returned with the message from Johnson. At that meeting, Grant simply did not convey the message to the tradesmen that Johnson requested him to convey. The initial statement by Grant was that "we weren't going to be compensated for the assignment", and he did not indicate that Johnson simply didn't have the authority to make any such commitment. This is clearly at odds with

the evidence given by both Grant and Van Sicle, and we are prepared to accept this evidence over their evidence as to how Grant conducted himself in the meetings with the boilermakers. That conduct clearly indicates that Grant was not simply acting as messenger but was acting as spokesman for the Boilermakers in demanding payment for the wrongful assignment of the previous day.

9. For the foregoing reasons, we are therefore prepared to accept that Grant did in fact act as spokesman for the striking employees and not simply as messenger. We are, therefore, of the view that discipline is justified in the present case.

10. Before we turn to the notion of remedy, there are two other matters raised by the respondent trade union in relation to this grievance which we should comment on. There was much evidence that Grant and Van Sicle remained on site after the tradesmen left the job. There is, however, a large discrepancy in when they actually left the job. It is clear they left together. The timekeeper put the time they left as “before the first split after 8:00 a.m.”. That is, before seven or eight minutes after the hour, the hour being split into quarters for time keeping purposes. Both Grant and Van Sicle and other witnesses gave evidence that Grant and Van Sicle remained on the job to assist in the moving of certain pieces of equipment. In this regard we are prepared to believe the evidence of the timekeeper over that of Grant and Van Sicle, although we point out that it makes no difference to the finding reached in the above paragraph. The leadership role was not that Grant was the first man through the gate leading the men in that way. The role of Grant was more of spokesman and it does not really matter whether or not he stayed on the job site after the men. He had already played his role in the unlawful strike.

11. The other matter relates to evidence concerning “the big lift”. The respondent trade union made much of the fact that the person who was ultimately responsible for the termination of Mr. Grant, Mr. Dave Butt, the manager of industrial relations for the applicant employer, “was out to get Ken Grant”. It would appear that a month or so before, shortly after Grant became job steward, there was a series of pre-fabricated towers and vessels of enormous weight removed from ships, transported to the job site, and erected on the job site by the boilermakers. It appears that the weather on the date of the “big lift” was not very good, and that Grant had a number of dealings with Mr. Butt concerning the working conditions for the men on that day. It appears that at one point during the day, Mr. Butt made a statement to Mr. Don Peer, an international representative of the Boilermakers, that “the job would be a good job if it wasn’t for Mr. Grant”. Peer, in turn conveyed to Grant, that his days as a steward on this job were numbered. Again, nothing hinges on whether or not, Butt harboured any personal animosity towards Grant. If Grant, as we have found, was prepared to be the spokesman for a group of striking employees then that role is sufficient to justify disciplinary action and Butt’s feelings towards Grant are quite immaterial in the present matter.

12. There remains to be dealt with the matter of the appropriateness of the discipline. The respondent trade union has asked that the penalty of discharge be varied in the circumstances of the present case. The collective agreement in effect in these circumstances contains as clause 10.02 the following:

“ARTICLE 10:00 – STEWARDS

10:01

On all jobs, the Business Manager or Assistant Business Manager of the Union will designate, or otherwise arrange for, the appointment of a Steward from among the qualified working journeyman employees.

In all Provinces, where the Occupational Health and Safety legislation requires the selection of a health and safety representative, that representative of the Boilermaker employees will be the Steward.

10:02

It will be his duty *to assist the Employer* and the Union members, in carrying out the provisions of this Agreement and he will be allowed reasonable time to perform such duties by the Employer's representative on the job."

(emphasis added)

It is clear, therefore, that the present case does not fall into that series of arbitral cases where there is some question about the duty owed by a union representative to the employer. It is clear in the present case that Mr. Grant, as a steward, owes a duty to the employer to assist the employer in carrying out the provisions of the agreement, including the "no strike" provision during the term of the agreement. As we have found, not only did he not comply with that duty but in fact acted as a leader in the unlawful strike. In these circumstances, we are of the view that this would not be an appropriate case in which to vary the remedy of discharge. Counsel for the respondent trade union cited a number of cases in which penalties of several days were upheld as the appropriate penalty for conduct during a strike. However, in none of those cases was the union representative under such a clear duty as that set out in clause 10:02 of the collective agreement. Accordingly, we refuse to exercise our discretion and vary the penalty imposed by the employer in this matter.

13. For the foregoing reasons, the grievance herein is dismissed.

0118-83-U Anne Moore, Complainant, v. Ontario Nurses' Association, and The St. Thomas-Elgin General Hospital, Respondents

Adjournment – Practice and Procedure – Unfair Labour Practice – Complaint filed and adjourned sine die with agreement of respondents brought on for hearing again – Complainant not denied compensation for period of adjournment where respondents' agreement to adjourn unconditional

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members R. J. Swenor and W. F. Rutherford.

APPEARANCES: Mary Cornish, Anne Moore and Gary Musgrave for the complainant; Donald F. O. Hersey, Q.C. and David Murray for the respondent Ontario Nurses Association; Brian O'Byrne and Don Sherin for the respondent The St. Thomas-Elgin General Hospital.

DECISION OF THE BOARD; October 31, 1983

1. The names of the respondents are amended to read "Ontario Nurses' Association and The St. Thomas-Elgin General Hospital".

2. This is a complaint filed under section 89 of the *Labour Relations Act* alleging a violation of section 68 of the Act. The complaint, which was filed on April 14, 1983, is in respect of an alleged breach of section 68 which took place on December 30, 1981. The respondents take the position, by way of preliminary objection, that the Board should dismiss the complaint because of the delay in filing. In the alternative, the respondents maintain that, if the Board decides to hear the complaint on its merits, it should rule that the complainant is not entitled to compensation for the period extending from December 30, 1981 up to September 20, 1983 when, after an adjournment *sine die* at the request of the complainant on May 17, 1983, the matter was brought on for hearing. There were no conditions attached to the respondents' agreement to adjourn *sine die* on May 17th. The parties were agreed that we should deal with the timeliness issue before proceeding further.

3. The Board made an oral ruling at the October 25th hearing as follows, which it hereby confirms

"Having reviewed the evidence and considered the submissions of the parties in light of the criteria set out at para. 22 of *The Corporation of the City of Mississauga* case [1982] OLRB Rep. March 420, we hereby find that this complaint should be heard on the merits and we hereby so direct.

However we find that the complainant, by reason of her delay in bringing this complaint is not entitled to monetary compensation for the period February 1, 1982 to April 14, 1983. In our view the complaint could have been lodged by February 1, 1982. If the respondents had wished to save themselves harmless from the possibility of compensation for the period of the *sine die* adjournment they should have stipulated this as a

condition of agreeing to the adjournment. Having failed to do so they are liable for compensation during this period.

4. Having regard to all of the foregoing this matter is hereby referred to the Registrar to be listed for a hearing on the merits.
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1204-83-U Ontario Nurses' Association, Complainant, v. Corporation of the City of Thunder Bay, Respondent

Duty to Bargain in Good Faith – Employer refusing to execute agreed upon collective agreement unless local union named – Bargaining rights held by ONA – Board finding bad faith bargaining and refusal to recognize bargaining agent – Directing execution of draft agreement

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *J. McCormack, E. Burke and Lynne Mattila for the complainant; no one appearing for the respondent.*

DECISION OF THE BOARD; October 21, 1983

1. This is a complaint under section 89 of the *Labour Relations Act* alleging violations of sections 15, 64 and 67. At the heart of this dispute lies a disagreement between the Ontario Nurses' Association ("ONA") and the City of Thunder Bay (the "City") concerning how the union party to a collective agreement ought to be described. The City insists that the collective agreement name both ONA and its Local 117, but ONA objects to any mention of the local union. The City did not appear at the hearing in this matter.

2. In 1974, ONA was certified to represent registered and graduate nurses employed by the City at Dawson Court and Grandview Lodge Homes for the Aged, with some exclusions not here relevant. Four collective agreements followed over the period from 1974 to 1980. The first named the City and ONA as parties. However, each of the other three agreements contained the following passage on the first page following the index:

BETWEEN

THE CORPORATION OF THE CITY OF THUNDER BAY

hereinafter referred to as the "Corporation"

OF THE FIRST PART

- and -

ONTARIO NURSES' ASSOCIATION AND ITS LOCAL 117

hereinafter referred to as the "Association"

OF THE SECOND PART

By contrast, only ONA is named on both the front page and the signature page of these contracts. The chief spokesperson for employees in each round of bargaining was a staff representative employed by ONA. On the evidence before us, we find the reference to the local union was never discussed at the bargaining table, was inserted by the employer who arranged for these agreements to be printed, and was during this period not noticed by ONA. ONA called a series of witnesses to establish these facts.

3. Negotiations to conclude a collective agreement for the years 1981 to 1983 are still underway. Evelyn Burke is the ONA employment relations officer handling this round of bargaining. According to Ms. Burke, the first discussion of Local 117 occurred on May 27, 1982 when the City introduced a memorandum referring to ONA and its Local 117. Matters remaining in dispute were the subject of an arbitration hearing held on October 13, 1982. The local union reference was not addressed at this time, and the arbitrator's award names only ONA. However, the issue resurfaced in the course of the Inflation Restraint Board's proceedings. In a letter to that Board, the City objected to ONA's attempt to delete any mention of a local union. ONA then wrote to the City, objecting that the local union's name had been "unilaterally" inserted in earlier agreements. The Inflation Restraint Board's decision of May 20, 1983 notes, in passing, that ONA represents the employees in question. At this stage, the disagreement over names was the only issue standing between the parties and a collective agreement. On June 30th, Ms. Burke advised the City that this Board had previously ruled that ONA, not a local, was the bargaining agent; a copy of this decision was forwarded to the City. Ms. Burke also brought of the City's attention three other decisions of this Board to the same effect. Mr. Antilla, manager of personnel and labour relations, responded in writing on July 5th:

While we disagree with what the ONA is doing to its Locals we will accept the fact that we will deal only with the ONA in the future providing we receive a letter from Local 117 instructing us to delete any reference to the Local in our Collective Agreement, in accordance with a majority vote of their Membership.

Evelyn Burke testified that on August 9th Mr. McNrue, the City's labour relations co-ordinator, told her the City would not sign a collective agreement that named only ONA. The most recent correspondence between the parties is a letter from the City to ONA dated September 30th:

We have reviewed the amended Collective Agreement attached to your letters of September 29th, and 30th, 1983, and agree with its contents except for the various deleted references to "Local 117".

5. Counsel for ONA contended the City has violated sections 15, 64 and 67 in two ways – by pushing a dispute about bargaining rights to impasse, and by insisting that ONA submit this issue to employees for a vote. We will address these arguments in that order.

6. The Board has on four previous occasions ruled upon the propriety of an employer

refusing to execute a collective agreement unless it named both ONA and a local union: *Hamilton-Wentworth Regional Health Unit*, Board File No. 1815-81-R, dated April 1, 1982; *The Board of Health of Niagara Regional Health Unit*, Board File No. 1914-81-R; dated April 1, 1982; *Sudbury and District Health Unit*, Board File No. 1913-81-R dated April 1, 1982; and *Regional Municipality of Niagara* Board File No. 2307-81-R, dated April, 15, 1982. The facts in these cases are indistinguishable from those at hand. There, as here, bargaining rights were granted to ONA, but a series of subsequent collective agreements referred to both ONA and the local. In the cases cited, the Board found that ONA had continued to exercise the bargaining rights granted to it and that the nomenclature used in the agreements was no more than a technical deficiency which did not impair ONA's status as the exclusive bargaining agent. We take the same view in the case at hand. In light of the earlier decisions, which were brought to the City's attention, we find its present position difficult to understand. For these reasons, we do not hesitate to find that the City violated sections 15 and 67 by insisting that Local 117 be named in the collective agreement, and thereby refusing to recognize ONA as the exclusive bargaining agent.

7. ONA sought an order directing the City to execute a collective agreement that does not refer to Local 117. The Board's policy with respect to this type of remedy was recently reviewed in *Treco Machine & Tool Limited*, [1982] OLRB Rep. Dec. 1954:

18. The Board has been asked to direct the employer to enter into a collective agreement. The Board has consistently recognized that the principle of voluntarism underpins the collective bargaining process established under the Act and has, therefore refused to direct the execution of a collective agreement where there is not a complete understanding between the parties. In the absence of a complete understanding, the Board would be required to impose terms if it was to direct that a collective agreement be executed and this it has refused to do. (See *Lake Ontario Steel Company Limited*, [1979] OLRB Rep. July 671, *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309, *Graphic Centre (Ont.) Inc.*, [1976] OLRB Rep. May 221). However, where the evidence establishes that all outstanding issues between the parties have been resolved, the Board has not hesitated to direct the execution of a collective agreement in the exercise of its remedial authority. (See *Coulter Copper & Brass Limited*, [1981] OLRB Rep. May 510; *Fotomat Canada Limited*, *supra*, *Wilson Automotive*, *supra*, *Selinger Wood*, *supra* and *Municipality of Casimir, Jennings and Appelby*, *supra*.)

The dispute over nomenclature is the only outstanding issue between the parties. In all other respects, they are in full agreement as to the terms of a collective agreement. These terms have already been approved by the Inflation Restraint Board. Consequently, pursuant to section 89, we direct the City to execute the draft collective agreement referred to in its letter of September 30th.

1252-82-U International Association of Machinists and Aerospace Workers, Complainant, v. **Treco Machine & Tool Ltd.**, Respondent, v. Group of Employees, Interveners

Practice and Procedure – Remedies – Unfair Labour Practice – Respondent found in breach of Act filing application for judicial review – Union deciding not to seek enforcement pending judicial review – Judicial review adjourned and Board proceedings frozen to permit settlement discussions – Union entitled to seek enforcement after settlement discussions break down – Board finding non-compliance and filing order in Courts

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members J. A. Ronson and H. Kobryn.

APPEARANCES: *James Hayes and Len Froggatt for the complainant; M. Contini, W. J. McNaughton and G. Alexi for the respondent; Robert Adourian for the interveners.*

DECISION OF THE BOARD; October 3, 1983

1. This is a complaint filed under section 89 of the *Labour Relations Act* in which it is alleged that the respondent employer violated sections 15, 64 and 66(a) of the Act. In a decision dated December 7, 1982 the Board found that the respondent breached sections 15 and 64 of the Act when it refused to execute a collective agreement on the basis of the terms of settlement proposed by it. In the exercise of its remedial authority the Board directed the respondent to execute a collective agreement containing the terms and conditions which it (the respondent) had proposed effective from September 13, 1982 and to apply the terms and conditions contained therein to the employees in the bargaining unit forthwith. In addition, the Board ordered a posting. There was also before the Board at the time an application for termination of bargaining rights which had been filed on October 19, 1982. Given the remedy that was sought, those seeking to terminate bargaining rights were given full status and participated in the hearing. The effect of the Board's order to enter into a collective agreement from September 13, 1982 had the effect of creating a timeliness bar to the application to terminate bargaining rights.

2. The matter presently before the Board is an application by the complainant under section 89(6) of the Act, dated July 13, 1983, to have the determination of the Board filed with the Supreme Court for enforcement. Section 89(6) provides:

Where the trade union, council of trade unions, employer, employers' organization, person or employee, has failed to comply with any of the terms of the determination, any trade union, council of trade unions, employer, employers' organization, person or employee, affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board in writing of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefor, if any, in the prescribed form, whereupon the determina-

tion shall be entered in the same way as a judgment or order of that court and is enforceable as such.

3. The respondent, while not disputing that the terms of the Board's order have not been put into effect, argues that in all the circumstances it should not be found that it has failed to comply with the Board's order. Alternatively, the respondent takes the position that even if the Board does not have a discretion under section 89(6) to refuse to make a non-compliance finding in the circumstances, it has a discretion under section 106(1) to reconsider its initial decision and vary its direction. The facts which the respondent relies on, which are undisputed, are as follows:

- In December, 1982 the parties entered into an agreement that this matter would proceed to judicial review with an expedited hearing.
- An expedited hearing was granted.
- The expedited hearing was adjourned on consent of the parties in order to allow the parties to pursue avenues of settlement.
- One of the stipulations made in respect of the adjournment of the expedited judicial review hearing was the agreement that all proceedings before the Board would be frozen. This stipulation was made on or about March 16, 1983.
- The settlement discussions were unsuccessful.
- The complainant advised that it would be seeking enforcement of the original Board order under section 89(6) in July, 1983.
- The respondent company has refiled its application for judicial review of the Board's December 7, 1982 decision which it anticipates will be heard by the Court this sitting.

4. The full text of the March 16, 1983 letter from counsel for the applicant union to counsel for the respondent company setting out the terms of their agreement is set out below:

This is to confirm my telephone conversation with you and Mr. Cook of your office in regard to the settlement of the above noted matter. My understanding of the settlement is as follows:

1. You will appear in court on March 16th 1983 to obtain an adjournment in regard to the application which was to be heard on this date.
2. All Board proceedings, including the termination application will be frozen.
3. A meeting between Len Froggat and representatives of the company will occur within a few weeks in regard to obtaining protection for the employees who supported the union.

4. Before a settlement is finally executed Mr. Cook will ensure that the union is paid \$1,500.00 for the costs it incurred in regard to the defence to the application for judicial review.

5. In the face of the complainant union's agreement not to seek enforcement of the Board's order pending judicial review and in the face of the subsequent agreement between the parties that "all Board proceedings ... will be frozen" the respondent asks the Board not to find non-compliance at this late date when the matter will shortly be before the courts on judicial review. In the alternative, the respondent asks the Board to exercise its discretion under section 106(1) in these circumstances to amend its initial order. The respondent cites *International Woodworkers of America and Patchogue Plymouth, Hawksbury Mills*, (1976) 14 O.R. 118 in support of its position.

6. The complainant trade union asks the Board to interpret the terms of the agreement to freeze all Board proceedings in context. The complainant takes the position that this agreement was entered into in order to facilitate settlement discussions and that when these discussions were unsuccessful the parties were no longer bound by the agreement so that the company was free to pursue its judicial review, which it has, and the union was free to seek enforcement of the Board's order, as it is now doing. The complainant takes the position that in the face of the respondent's failure to execute the terms of the Board's order the Board has no discretion under section 89(6) to refuse to enter its order in the same way as a judgment or order of the Court. Citing *Fotomat Canada Limited*, [1980] OLRB Rep. Nov. 1643 at para. 10, the complainant argues that there is nothing before the Board as should cause it to exercise its discretion under section 106(1) of the Act to reconsider its initial decision.

7. The decision of the complainant trade union not to seek enforcement of the Board's order in this matter pending an expedited judicial review does not in any way prejudice its right to seek enforcement following the adjournment of the expedited judicial review hearing. The agreement between the parties under which the expedited judicial review was adjourned and all Board proceedings frozen must be read as laying the groundwork for the settlement discussions which followed. The failure of these settlement discussions allowed the parties to revert to their former positions and to pursue whatever avenues were open to them prior to the March 16, 1983 undertakings. When the settlement discussions broke down the Board proceedings became "unfrozen" as did the undertaking to adjourn the judicial review. There is no dispute that the terms of the Board's order have not been implemented and, in these circumstances, we are required under section 89(6) to file our order with the court. Whereas the court had a discretion not to enforce the order of the arbitration board in *Re International Woodworkers and Patchogue Plymouth Hawkesbury Mills*, *supra*, we have no such discretion in the circumstances of this case under section 89(6) of the Act. Finally, for the reasons set out at para. 10 of the Board's decision in *Fotomat Canada Limited*, *supra*, we are not prepared to exercise our discretion under section 106(1) of the Act to reconsider our decision of December 7, 1982 in this matter.

8. Having regard to the foregoing, we hereby find that the respondent company has failed to comply with the order contained in the decision of the Board in this matter dated December 7, 1982. Accordingly, the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination in the prescribed form.

0052-83-U Labourers' International Union of North America, Local 506, Complainant, v. **Verdi Forming Limited**, The Ontario Formwork Association, Labourers' International Union of North America, Local 183, Rampart Enterprises Limited, Metro Toronto Apartment Builders Association, Respondents, v. The Formwork Council of Ontario, Intervener

Construction Industry – Practice and Procedure – Unfair Labour Practice – Local 506 having exclusive bargaining rights for formwork labourers under province-wide agreement – Formwork sub-contracted to employer having agreement with Local 183 to use its members – Minister's designation clearly exempting Local 183's relationship – Arrangement between general sub-contractor and Local 183 not affected by section 146 – Complainant dismissed as not disclosing prima facie case

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and F. W. Murray.

APPEARANCES: *Chris G. Paliare and Michael Gargaro for the applicant; R. J. Goodman for Verdi Forming Limited and The Ontario Formwork Association; A. M. Minsky, B. S. Fishbein and C. DeToni for the respondent Labourers' International Union of North America, Local 183 and the intervener The Formwork Council of Ontario; R. C. Fillion and K. Mallette for the Metro Toronto Apartment Builders Association; D. Jane Forbes-Roberts and Janet Trim for the Toronto Construction Association.*

DECISION OF THE BOARD; October 6, 1983

1. The names of certain of the respondents are hereby amended to read: "The Ontario Formwork Association" and, "Rampart Enterprises Limited".

2. The complainant has complained under section 89 of the *Labour Relations Act* that it has been dealt with by the respondents on its own behalf and on behalf of all of its members contrary to the provisions of section 146 of the *Labour Relations Act*.

3. The complainant seeks the following relief:

1. a declaration that the respondents have violated the *Labour Relations Act*;
2. a declaration that Labourers' International Union of North America, Local 183 ("Local 183"), and Verdi Forming Limited ("Verdi") have entered into a collective agreement or arrangement which is contrary to the provincial agreement and therefore in violation of section 146 of the *Labour Relations Act*;
3. a declaration that any agreement or arrangement other than the one contained in the provincial agreement is null and void;
4. an order that Local 183 be prohibited from filling any requests for workmen by any employer to do formwork on this particular project;

5. an order that Verdi be precluded from forwarding welfare, dues, pension or any other related payments to Local 183 or any of its pension funds for any employees who are engaged in performing formwork at the project in question;
6. an order that the respondents are jointly and severally liable to pay to the complainant on behalf of its members all wages, benefits and dues that have already been paid by Verdi to Local 183 and its members;
7. an order that Verdi cease and desist from hiring members of Local 183 to do the forming work on this project; and
8. an order against Verdi, Rampart Enterprises Limited ("Rampart"), and Local 183, jointly and severally in respect of all costs, legal and otherwise arising from the violations of the provincial collective agreement and the Act.

4. The complainant alleged in its complaint that it is the exclusive bargaining agent for all formworker labourers on building structures within the Board's geographic area #8 and that article 9 of the Local Union Schedule for the complainant of the provincial collective agreement reads as follows:

For the purpose of Article 2, of the Master Portion of the Provincial Agreement Local 506 shall be recognized as the exclusive affiliated Bargaining Agent for the work of Formworker Labourers on Building Structures within the Ontario Labour Relations Board Area No. 8.

The complainant also alleged that Rampart is the developer and general contractor for a major building project located on the southwest corner of McCowan and the 401 adjacent to the Scarborough Town Centre (the "project"). It is the position of the complainant that the work in question is work normally done in the industrial, commercial and institutional sector of the construction industry.

5. The complainant has further alleged that Rampart is bound by a collective agreement with Local 183 as a result of Rampart being a member of the Metro Toronto Apartment Builders Association (the "MTABA") and that Rampart has subcontracted the formwork on the project to Verdi. There is no dispute that Verdi and Local 183 are each bound by a collective agreement between The Ontario Formwork Association (the "Association") and The Form Work Council of Ontario (the "Council").

6. The complainant also alleged that the work on the project started in or about the week of March 21, 1983, with workmen supplied by Local 183 to Verdi. It is the position of the complainant that since the project is in the industrial, commercial and institutional sector of the construction industry if the formwork on the project is to be done by members of Local 183, the work will be done in a manner which is contrary to the provisions of the provincial collective agreement and therefore amounts to an arrangement or a collective agreement which is contrary to the provisions of section 146. It was the position of the complainant that virtually all of the subcontractors that are engaged in the project, with the exception of

Verdi, are employers who are bound by provincial collective agreements in the industrial, commercial and institutional sector of the construction industry with the various trades.

7. The complainant also alleged that in a telephone conversation on or about January 18, 1983, Tony Neil, field representative of the complainant, asked Mr. Verrilli, a principal of Verdi, to enter into a collective agreement with the complainant with respect to the project. The complainant viewed the project as being in the industrial, commercial and institutional sector of the construction industry. It is alleged that Mr. Verrilli responded that he was unable to sign a collective agreement with the complainant because he was "with Local 183" and that Rampart, the developer on the project, had advised Verdi to "bid this job 183". It is further alleged that Mr. Verrilli refused to discuss the matter any further with Mr. Neil or any other representative of the complainant.

8. The complainant has further alleged that Verdi, Rampart and Local 183 have entered into an agreement or arrangement which is contrary to the provisions of the provincial collective agreement such that members of Local 183 are being used to do the formwork on the project and thereby Verdi, Rampart and Local 183 are contravening the provisions of section 146 of the *Labour Relations Act*. The complainant also alleged that the Forming Contractors' Association and the MTABA as the bargaining agent for Verdi and Rampart, respectively, knew, or ought to have known, that one of their members was engaging in conduct contrary to section 146 and took no steps to prevent such breach.

9. At the hearing Local 183 made a motion to dismiss this complaint because no cause of action arose on the facts alleged by the complainant. It was the position of Local 183 that section 89 is a procedural or remedial section and permits enforcement of the unfair labour provisions of the *Labour Relations Act*. Local 183 characterized the issue as whether it is a contravention of section 146 to supply workers on a project in the industrial, commercial and institutional sector of the construction industry and that this strikes at the question of the bargaining between the Association and the Council. Local 183 posed the question of whether a collective agreement arising from such bargaining is in any way affected or recognized by the designation orders of the Ministry of Labour under section 139 of the *Labour Relations Act*.

10. The employee bargaining agency designation states:

The designation of The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council dated April 21, 1978 and amended July 13, 1978 is further amended by including amongst the employees affected by the designation plasterers and plasterers' apprentices. The designation is also amended by substitution of the words "Formwork Council of Ontario" for the words "Form Work Council of Ontario" in the last paragraph. Accordingly, the amended designation reads as follows:

Pursuant to clause *a* of subsection 1 of section 127 [now section 139] of The Labour Relations Act, R.S.O. 1970, c. 232, as amended, I hereby designate The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council as the employee bargaining agency to represent in bargain-

ing all construction labourers, including masons' or bricklayers' tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work, represented by the following affiliated bargaining agents.

1. The Labourers' International Union of North America; or
2. The Labourers' International Union of North America Ontario Provincial District Council; or
3. The following Local Unions: 183, 247, 491, 493, 506, 527, 597, 607, 625, 749, 837, 1036, 1059, 1081 and 1089; or
4. Any other Local of The Labourers' International Union of North America which, in the future, may be chartered to represent construction labourers, including masons' or bricklayers' tenders, plasterers and plasterers' apprentices, and employees engaged in cement finishing, waterproofing or restoration work;

(Which Council and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

For purposes of clarity, it should be noted that notwithstanding the fact that locals set out in paragraph 3 above are affiliated bargaining agents within the meaning of clause a of section 125 [now section 137] certain of them have or may acquire bargaining rights, or are, or may become bound by, certain collective agreements affecting all sectors of the construction industry covering all employees engaged in concrete forming construction, namely the agreement between Locals 183 and 1081, and the Ontario Form Work Association and between Local 493 and Romm Construction Company Limited, whereby they represent employees who do not commonly bargain separately and apart from other employees. Therefore, with respect to bargaining on behalf of employees of members of the Ontario Form Work Association and Romm Construction Company Limited, and such other employers for whom any of the local unions have or may acquire bargaining rights for all employees engaged in concrete

forming construction, such locals are not affiliated bargaining agents within the meaning of clause a of section 125 [now section 137], nor are they included in or covered by this designation under subsection 1 of section 127 [now section 139], nor are they or the said collective agreements and bargaining thereunder affected by section 133 [now section 146] of The Labour Relations Act.

Pursuant to subsection 2 of section 127 [now section 139] of The Labour Relations Act I hereby exclude from this designation the bargaining relationship between the Formwork Council of Ontario and the Ontario Form Work Association.

[emphasis added]

11. Local 183 argued that the relationship between itself and the Council is specifically and clearly exempted and precluded from the employee bargaining agency designation of The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council. Local 183 further argued that the collective agreement between itself and the Association continues to be a lawful one and has been excluded by the Minister of Labour pursuant to section 139(2) [formerly section 127(2)] of the *Labour Relations Act*, thereby declaring that Local 183 is not an affiliated bargaining agent with respect to bargaining on behalf of employees of members of the Association and such other employers for whom any of the local unions have or may acquire bargaining rights for all employees engaged in concrete forming construction.

12. Local 183 reasoned that it was not affected by section 146 [formerly section 133] because of the very clear language of the designation and that there could be no violation of section 146 because Local 183 and Verdi are working outside the provincial collective agreement. Local 183 characterized the complainant's complaint as resting upon a claim of exclusive rights in the Board's geographic area #8 and that the defence to the complaint is based on the provisions of the *Labour Relations Act*.

13. MTABA, Rampart and Verdi supported the motion of Local 183. It was pointed out that there was no allegation that Rampart was bound by the provincial collective agreement and that, in fact, Rampart is not bound by the provincial collective agreement. Rampart volunteered that it is bound by an exclusively residential collective agreement with MTABA. Rampart and MTABA argued that whether or not the complainant could make out a case against Local 183, Verdi and the Association, a case could not be made out against Rampart and MTABA. The employee bargaining agency designation was viewed by Rampart and MTABA as a complete answer to the complaint. Verdi adopted the position that it was not an employer bound by the provincial collective agreement and that in these circumstances it could not be conducting itself contrary to the provisions of section 146.

14. The complainant opposed the motion to dismiss its complaint and urged the Board to exercise caution. The complainant argued that all it was required to do was to establish that a *prima facie* case has been made out and that construction work was being done in the industrial, commercial and institutional sector of the construction industry pursuant to an agreement or arrangement other than the provincial collective agreement. It was pointed out that if the complainant's allegations are proven then there is an arrangement between an em-

ployer and a trade union to specifically circumvent the provisions of the provincial collective agreement. The complainant urged the Board to consider the whole notion of provincial bargaining in the industrial, commercial and institutional sector of the construction industry. The complainant argued that the exemption in the designation ought to be narrowly construed and be read with the overall purpose of the *Labour Relations Act* in mind. It was pointed out that the Board had never certified Local 183 in the industrial, commercial and institutional sector to do formwork and it was urged that the Board consider the historical perspective on bargaining in the construction industry. The Toronto Construction Association supported the position of the complainant.

15. The complainant has alleged a violation of section 146 of the *Labour Relations Act* and urges the Board to hear the evidence in support of its complaint and argued that all it was required to do was to establish that a *prima facie* case has been made out. The motion for the dismissal raises an even more fundamental issue, namely, whether the alleged conduct discloses a violation of section 146. The provincial collective agreement purports to state that the complainant shall be recognized as the exclusive affiliated bargaining agent for the work of formworker labourers on building structures in the Board's geographic area #8. The Minister of Labour, pursuant to section 139(1) and (2) of the Act has designated an employee bargaining agency with respect to essentially construction labourers. However, the Minister of Labour has made an exclusion of certain bargaining relationships including all sectors of the construction industry covering all employees engaged in concrete forming construction. The agreement between Locals 183 and 1081 and the Association is specifically contemplated as a collective agreement excluded thereunder and not affected by section 146. Moreover, the exclusion in the employee bargaining agency designation expressly contemplates not only presently existing bargaining rights but also prospective bargaining rights which may be obtained in the future. Indeed, in *Matterhorn Construction (Hamilton) Limited*, [1981] OLRB Rep. Sept. 1276, the Board granted interim certification to Local 183 as the exclusive bargaining agent of all employees of an employer engaged in concrete forming on residential building projects in the Board's geographic area #8 in an application for certification made pursuant to section 144(5) of the Act.

16. The complaint is generally framed as a violation of section 146. The respondents are neither employee nor employer bargaining agencies and are therefore incapable of violating section 146(1). Section 146(3) addressed the expiry of provincial collective agreements and can clearly have no relevance to this complaint. There remains section 146(2) which states:

On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting the employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

Section 146(2) is made subject to sections 139 and 145. In the employee bargaining agency designation the Minister of Labour has made the exclusion under section 139(2) as referred to previously. Section 139(2) states that section 146(2) does not apply to such exclusion.

17. In *Matterhorn Construction (Hamilton) Limited, supra*, the Board observed that Local 183 is not a trade union represented by an employee bargaining agency when it comes to employees engaged in concrete forming construction. The employees who are employed by and working for Verdi in concrete forming construction are, in the language of section 146(2), not employees represented by affiliated bargaining agents by virtue of the exclusion in the employee bargaining agency designation. Therefore, any collective agreement or arrangement affecting such employees insofar as it pertains to concrete forming construction is not a violation of section 146(2).

18. For the past twenty years there have been accommodations, disputes, concessions, exchanges and confrontations between the complainant and Local 183 on the subject of work jurisdiction in the Board's geographic area #8. These differences have been considered by the Board on several occasions, most recently in *Pelar Construction Ltd.*, [1981] OLRB Rep. Feb. 210; and previously in *Cross Town Paving*, [1965] OLRB Rep. May 128 and in *Peniche Construction Forming*, [1974] OLRB Rep. April 208. The complainant and Local 183 have once again confronted each other with the complainant relying on the provisions of a provincial collective agreement and Local 183 relying on the exclusion contained in an employee bargaining agency designation. The Board expresses no opinion on the propriety of article 9 of the Local Union Schedule for the complainant of the provincial collective agreement. It is our finding that on a fair reading of the provisions of the *Labour Relations Act* the complainant has failed to establish a violation of the Act. It may well be that the evidence which the complainant would propose to adduce in support of its complaint would elaborate its apprehension at the competition from Local 183 and the other respondents. However, the complainant in a complaint under section 146 must persuade the Board that it has at least an arguable case with respect to a violation of that section. This it has failed to do and this complaint is accordingly dismissed.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

1. I must reluctantly agree with the majority to dismiss this complaint because the designation order for the employee bargaining agency comprised of The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council, exempts employees of members of the Ontario Form Work Association and "...such other employers for whom any of the local unions have or may acquire bargaining rights for all employees engaged in concrete forming construction." [emphasis added]

2. However, I have concern that the present form of the Labourers' designation order undermines the scheme of provincial bargaining in the industrial, commercial and institutional sector of the construction industry with respect to all of the trades involved in concrete forming.

3. I cannot leave this decision without commenting upon the surrounding circumstances that gave rise to this issue being litigated before the Board which I am familiar with because of my background in the construction industry prior to my appointment to the Board

in 1979. I was a member of the Construction Industry Review Panel appointed by the Government of Ontario to advise the Minister of Labour from 1972 to 1979. From 1967 to 1975, I was the Business Representative and from 1975 to 1979, the Business Manager of the Toronto Building and Construction Trades Council. It was the Construction Industry Review Panel that recommended the adoption of the concept of province-wide bargaining on a single craft basis to the Minister of Labour following the Report of the Franks Commission; our objective was to bring greater stability to labour relations in the industry by establishing co-ordinated bargaining. The Panel was at the forefront of providing the information and support for the creation of the legislation that came to fruition in October, 1977 through Bill 22. As a representative of the Toronto Building and Construction Trades Council, I was also heavily involved in the organizing and administration of the residential sector of the construction industry in Board Area 8 (Metropolitan Toronto and surrounding vicinity).

4. In 1969, the Council and the Metropolitan Toronto Apartment Builders' Association entered into a master recognition agreement that established a collective bargaining relationship between the Council and its affiliated unions and the Association and its members that was intended to bring stability to the residential sector in Board Area 8.

5. When the province-wide bargaining legislation was being considered in 1977, there was concern as to which sectors of the construction industry would be covered, and, in particular, whether the residential sector would be subject to it. The Metropolitan Toronto Apartment Builders' Association made strong representations to exclude the residential sector from the legislation. The Toronto Building and Construction Trades Council and its affiliated unions did not oppose the representations made by the Association, primarily because during the period after the signing of the master agreement a fairly good relationship had developed between the Council and the Association and the Council and the Association had set their minds to establishing a clear demarcation between residential and commercial construction. Prior to the preparation and introduction of provincial bargaining legislation, the Association and the Council had negotiated the following clause into the Master Agreement: "those sections of a multi-towered single complex on a common podium which are divided vertically by lines relating directly to commercial and residential sections; each section shall be built according to its base use". It should be noted that until 1977, any commercial building that a member of the Association worked on was generally a mixed commercial/residential project. Apparently this has changed since 1977. Another reason the Council did not oppose the Association's representations to have the residential sector excluded from provincial bargaining was that outside of Board Area 8 residential construction was generally unorganized and there was no labour relations structure involving a major builders' organization outside of Board Area 8 comparable to the relationship between the Council and the Association.

6. I do not believe that any of the parties involved in the implementation of the provincial bargaining legislation; management, labour or the Government envisaged or intended that, by excluding the rTrades Council, I was also heavily involved in the organizing and administration of the residential sector of the Building Trades Council or any of its members would have a licence to engage in construction work in the ICI sector using their "residential" agreements to compete against contractors that are bound to the provincial agreements covering the ICI sector.

7. I believe that the province-wide bargaining scheme, legislated in 1977, intended to have collective bargaining and provincial agreements established on a single trade union basis,

parallel to the structure of the Building Trades Department of the AFL-CIO. It would not apply to trade unions that organize and represent all employees such as the Christian Labour Association of Canada ("CLAC"). However, the Labourers' International Union of North America, an affiliate of the Building Trades Department, requested the exemption for Form Work Agreements covering all employees. The Labourers' designation order excludes collective agreements covering all employees engaged in concrete forming, namely the agreements between Locals 183 and 1081 and the Ontario Form Work Association and between Local 493 and Romm Construction Company Limited, whereby they represent employees who do not commonly bargain separately and apart from other employees. Therefore, with respect to bargaining on behalf of employees of members of the Ontario Form Work Association and Romm Construction Company Limited, and such other employers for whom any of the local unions, that is, locals of the Labourers' Union, have or may acquire bargaining rights for all employees engaged in concrete forming construction, the scheme of province-wide bargaining does not apply to them in respect of concrete forming construction.

8. Counsel for Local 183 stated at the hearing that because of the Labourers' designation order it is at liberty "to go its merry way." I think he is, unfortunately, correct, notwithstanding that Local 506 apparently believed that their interests were protected under the Labourers' provincial agreement by the Local Union Schedule, Article 9, Sub-Contracting, which states in section 9.01: "For the purpose of Article 2 of the Master Portion of the Provincial Agreement Local 506 shall be recognized as the exclusive affiliated Bargaining Agent for the work of *Formworker Labourers* on Building Structures within Ontario Labour Relations Board Area No. 8. [emphasis added] It is obvious that Local 506 has bargaining rights in respect of concrete forming only where it has a contractual relationship with contractors who are bound to the provincial ICI agreement, or where it acquires bargaining rights for *labourers only*."

9. Local 506 may well be justified in having apprehensions about the competition it faces, but there will be many other employee bargaining agencies and employer bargaining agencies that also will have, and probably do already have, apprehensions when members of the Metropolitan Toronto Apartment Builders' Association are at liberty to enter the ICI sector of the construction industry by engaging members of the trade unions affiliated with the Building Trades Department to construct buildings under terms and conditions that are different than those established by the provincial agreements covering the ICI sector.

10. It was the Labourers' International Union of North America and the Labourers' International Union of North America Ontario Provincial District Council, of which Local 506 is an affiliated union, that requested the Minister of Labour in 1977 to exclude concrete forming from the employee bargaining agency designation. It is obvious, therefore, that any redress to Local 506's problem can only come from that same source.

0646-83-R; 0811-83-U International Ladies' Garment Workers' Union, Applicant, v. Vogue Brassiere Incorporated, Respondent, v. Group of Employees, (Objectors)

Interference in Trade Unions – Petition activity on plant floor during work hours in view of management – Whether granting of “unusual” benefits during organizing campaign seen as bribe to keep union out – Whether remarks about job security made in abstract influencing petition – Board finding petition not voluntary – Review of limits of free speech protection for employer communications

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members J. A. Ronson and L. Collins.

APPEARANCES: *S.B.D. Wahl, E. Ziemba and H. Stewart for the applicant/complainant; Brian P. Smeenk, E. Lazarich, F. Piltz and J. Priebe for the respondent; Barb Kirk and Dawna Martin for the objectors.*

DECISION OF RICHARD M. BROWN, VICE-CHAIRMAN, AND BOARD MEMBER L. COLLINS; October 26, 1983

1. The International Ladies' Garment Workers' Union (the union) has applied to be certified to represent the employees of Vogue Brassiere Inc. (Vogue) at its Cambridge plant. Four petitions in opposition to the union have been filed with the Board.

I

2. By decision dated August 17, 1983, another panel of the Board found the applicant to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*, and noted the parties had agreed to the following bargaining unit:

all employees of the respondent in Cambridge, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, designers, mechanics, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.

The Board also dismissed charges made by Vogue against the manner in which the union obtained membership cards.

3. The applicant has filed documentary evidence which establishes that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on July 6, 1983, the terminal date fixed for this application and the date which the Board established, pursuant to section 103(2)(j) of the Act, to be the time for determining membership under section 7(1) of the Act. This evidence is in the form of membership cards containing a combination application for membership and receipt. The applications are signed by the individual employee concerned, and the receipt is countersigned by the collector and acknowledges the payment of one dollar. These cards comply with the membership criteria prescribed by section 1(1)(l) of the Act and established by the Board pursuant to section 103(2)(j). The documentary evidence of member-

ship is supported by a properly completed Form 9, Statutory Declaration, attesting to its authenticity. Another panel of the Board found the employees who signed these cards did so because they decided of their own free will to be represented by the applicant. Accordingly, in the absence of other evidence relating to membership, the union has a sufficient level of support to be certified pursuant to section 7(3) of the Act without recourse to a vote.

4. However, a group of employees have also filed petitions signed by a number of people who are opposed to the certification of the applicant. These petitions contain the names of some individuals who previously signed membership cards and paid one dollar to the applicant, and who thereby became members of the union within the meaning of section 1(1)(l) of the Act. Indeed, less than fifty-five per cent of the employees in the unit signed a card but did not sign a petition. Consequently, if the employees whose names appear on both a card and a petition signed the petition voluntarily, the Board would normally exercise its discretion under section 7(2) of the Act by ordering a vote. Conversely, a petition spawned by improper employer influence, either real or reasonably perceived, would be disregarded and would not preclude certification on the basis of membership evidence.

II

5. This is the union's second attempt to organize these employees; three years ago the union was defeated in a pre-hearing vote. The current campaign began on the evening of May 5, 1983, when organizers visited several employees at their homes. The next morning Barbara Kirk, one of the petitioners, phoned Jim Priebe, the plant Manager, to inform him of the union's activities. On May 6th, two union organizers distributed leaflets in Vogue's parking lot as employees left work; the opening paragraph referred to a wage increase implemented by Vogue:

The union has been making home visits. Now the boss gives you a 30¢ raise. If the boss pays only 30¢ just because the union has been coming around, how much more would the boss pay when the union gets in.

Fernando Machado, one of the petitioners, spoke to Jim Priebe the following day about the literature.

6. A wage increase of thirty cents per hour was put into effect on May 5th. It had been announced by Enzo Lazarich, Vice-President in charge of manufacturing, at a meeting of all employees in the second week of April. Vogue's employee handbook calls for a "pay review" in the first week of May each year, and, with rare exception, this is the time wages have been adjusted over the last five years. A departure from the general practice occurred in 1982, when employees received a pay increase in January. In November, 1982, Mr. Lazarich announced that there would be no increase in January, 1983, because the company had just been through a "lean" period. (Forty people had been laid off from March to July, 1982.) On receiving a copy of the leaflet handed out on May 6th, Mr. Lazarich spoke with Frank Piltz, a principal and officer of Vogue. They prepared a speech in consultation with counsel, and Mr. Lazarich read it to employees on May 10th.

Before I finish talking to you today, I want to say a few words about the union organizing campaign. Before I continue, I want to make it clear

that your attendance for this part of my talk is completely voluntary. You can leave now if you want to.

I am reading from prepared notes for this part of my talk, in order to prevent any union organizers from misquoting me.

Last Friday organizers from the International Ladies' Garment Workers Union were handing out pamphlets near the plant. You may have received such a pamphlet.

Those of you who have been with us two years or more will recall that this same union tried to get certified at our Cambridge plant approximately two years ago. The union was soundly defeated in a vote held by the Ontario Labour Relations Board.

Management's position concerning unionization has not changed in the past two years. As we told you then, we do not want the Union and we do not think that you need a Union. Our Cambridge employees came to this same conclusion two years ago and we see nothing different that could change this conclusion.

Up to now management has been able to deal with all of our employees as individuals. If the union were to get in, you would be governed by a union contract and union constitutions. The Company would not be able to deal with you on an individual basis in matters relating to wages, working conditions, and any individual problems which arise from time to time.

All of you have been given an Employee Handbook which states our employment policies, our benefits and working conditions. You can compare for yourself how our working conditions and policies compare to other similar companies. We know that we compare favourably.

In its pamphlet, the union charges that you have been given a thirty cent increase "just because the union has been coming around". You know that this is totally untrue. You know that your regular wage increase occurs each May, as specified in your Employee Handbook. Your [sic] also know that we announced this last increase in early April, long before there was any sign of union activities. We would certainly not change our plans because the union arrives on the scene.

As you know, we have been able to keep fairly busy over the last few months. With your help we have been able to meet the needs of our customers. We have worked some overtime and added some employees. We are hopeful that, with some improvement in the economy, together with our new promotion campaign which I showed you about six weeks ago, will have the result of maintaining our stability and growth.

All of these factors combined have enabled us to weather the storm during the recent recession in better condition than many other employers. We have been able to avoid the same kinds of lay-offs and plant closures which have been experienced by many other companies.

The choice of wheter [sic] or not you want to join a union is totally up to you. But give it very serious consideration. Decide for yourself and don't be influenced by outsiders.

If you are approached again by union organizers, you may want to be aware of what your rights are. For those of you who are interested, we are providing a handout which states what your rights are under the Labour Relations Act of Ontario, according to the Ontario Labour Relations Board.

Again, I want to repeat that I personally do not think you need a union. Let us continue to work together as we have up to now.

A notice was also distributed to all employees on May 10th:

In recent days union organizers from the International Ladies' Garment Workers Union have been approaching our employees to convince you to sign union cards. These organizers are attempting to get enough cards signed so that they can request the Ontario Labour Relations Board to certify the union as representative [sic] of our employees.

The decision of whether to sign a union card is your decision.

It is an important decision and you may therefore wish to be aware of what your legal rights are under the Labour Relations Act of Ontario, as determined by the Ontario Labour Relations Board. You should be aware of the following:

1. If you are approached by a union organizers, you do not have to listen to them unless you want to.
2. You have the right to join or refuse to join a union. If you do not wish to join union, do not sign a card provided to you by the union organizers.
3. You should be aware that if the union gets enough cards signed by our employees, the union can be certified without a vote even taking place.
4. It is unlawful for anyone to threaten or harass you on behalf of or against the union. If you experience any such activities, you should report it immediately to management.

7. At another meeting convened by the employer on June 3rd, Mr. Lazarich told em-

employees that Vogue was increasing its contribution towards their OHIP coverage. The employer's contribution previously had been 25% for persons employed more than one year and 50% for those employed more than two years; the new rates are 25% after three months and 75% after six months. Mr. Lazarich told employees this change was triggered by an increase in premiums fixed by the Ministry of Health. On May 11th, the Ministry had announced that single and family rates were to go up by \$1.35 and \$2.70 respectively. Mr. Lazarich conceded at the hearing that Vogue's generosity more than compensated for the premium hike. He also testified Vogue was able to increase OHIP benefits because its economic fortunes had turned around by the end of 1982. Employees were invited at the June 3rd meeting to select two free garments. According to Lazarich, this gift was tied to an advertising campaign launched several months before. At an employee meeting in mid-March, he had announced that a video tape displaying the "intimates" line would be shown in stores across the country, and that consumers who bought two brassieres would receive a third for free. This was the first time Vogue had promoted its product in this way. Lazarich testified that Vogue expected to incur a loss on the campaign, but instead was pleasantly surprised by a profit, and that a number of employees worked a substantial amount of overtime in the spring of 1983 to produce "intimates". On June 3rd, Mr. Lazarich told employees the company had given free garments to customers, and wanted to do the same for employees who had worked hard to make the venture a success. The free garments were given to all employees of Vogue, including those working at the Toronto plant and at sales outlets across Canada. This is the first time all employees have been given free garments, although previously gifts have been made to brides, and one or two employees have been provided with a new product to "wash and wear" test. The only other gifts Dawna Martin could recall are tickets for Canada's Wonderland that were passed out on July 15th. At one point in the June 3rd meeting, someone called out "bribe" in response to this gift. France Mercier, a sewer at Vogue, testified this remark was loud enough for all to hear, but she did not associate the comment with the union's organizing campaign. Mr. Lazarich did not hear anyone say bribe, but an unidentified employee told him someone did. Lazarich testified that the lady who spoke to him asked if employees were being to talk to you today concerning the union organizing campaign which is still continuing. Before Mercier, Lazarich responded to the suggestion of a bribe by saying people could think what they wanted. Mrs. Machado testified that Mr. Lazarich said that some people might think the benefits were related to the union, but this was not true. Lazarich denied making any such comment.

8. Mr. Lazarich spoke to an assembly of employees again on June 13th. Once more he read a speech written in consultation with counsel.

I want to talk to you today concerning the union organizing campaign which is still continuing. Before I continue, I again want to make it clear that your attendance here is completely voluntary. You can leave now if you want to. I am again reading from prepared notes for this talk, in order to prevent any union organizers from misquoting me.

As you are all no doubt well aware, organizers from the International Ladies Garment Workers Union have been approaching and bothering our employees for over a month now. They are attempting to sign up enough of our employees to enable them to apply to the Ontario Labour Relations Board for certification as bargaining agent for this Plant.

The fact that the union is still continuing the organizing campaign and has not made any application to the Labour Relations Board indicates that they do not have enough employees signed up to enable them to be certified. They will therefore probably continue their organizing efforts until either they realize that our employees are not interested in becoming unionized, or until they gain sufficient support to make the application to the Labour Relations Board.

We regret that some of you have apparently been bothered repeatedly by the union. Unfortunately there is very little that we can do about that, unless we hear about any intimidation or harassment tactics by the union. It is not unlawful for the union to approach you and try to talk to you, but it is unlawful for anyone to threaten or harass you on behalf of the union. If you experience any such activities by union organizers, you should report it to management immediately.

Also remember that if you do not want to talk to the union, you can simply refuse to do so. Just as you would with any panhandler on the street or door-to-door salesman you need not allow them to bother you or let them into your home unless you want to.

It is up to you personally [sic] decide whether to join or refuse to join the union. But if you do not wish to join the union, do not sign a union card, since once it is signed the union will probably never return it to you, but instead will try to use it for their application to the Labour Board to be certified for this Plant.

Decide for yourself whether you want to join a union or refuse to do so. Don't be influenced by these outsiders. Do not be influenced by empty promises. You should place no faith in any union promises, since if the union were to be certified as the representative of our employees, it would only get the right to negotiate with the Company. The union could not force the Company to give anything that we are unable or unwilling to give.

In considering whether you want to join the union, we ask you to think about some of the following points. Firstly, ask yourself why the union is so interested in signing you up. Obviously, your membership means more money for the union in the form of initiation fees and membership dues. Have you asked the union how much your dues would be if they become certified? Find out before it is too late.

Secondly, you should realize that if the union gets in the Company could not continue to deal with you on an individual basis in matters relating to wages and working conditions, because the Company would be forced to strictly follow a union contract.

Thirdly, you should realize that unions most often insist that their contracts include clauses that require the compulsory deduction of dues from

employees' paycheques, and also compulsory membership in the union. If the union were to be successful in such a demand, the Company would be forced to not employ anyone who chooses not to join the union or pay their dues.

Fourthly, remember that if the union gets in, there would always be the possibility of strikes occurring. Strikes would occur if the Company and the union could not agree on a collective agreement.

Finally, you should be aware that if the union gets enough cards signed, they could be certified by the Labour Board without any vote ever taking place. This may strike you as not very democratic, but it is the law. For this reason, you should give very careful consideration before deciding to sign a union membership card. Do not be fooled by the vague assurances that the union organizers might give you. And I repeat, if you do not wish to discuss the matter with them, you may simply refuse to talk to them.

As you know, the same union tried to get certified at our Cambridge Plant approximately two years ago, but was soundly defeated in a vote held by the Ontario Labour Relations Board. As we told you then, we do not want a union and we do not think that you need a union. Our Cambridge employees came to this same conclusion two years ago and we still see nothing different that could change this conclusion.

We only regret that the union has not yet given up its tiresome and bothersome efforts.

If you have any questions, please feel free to approach me on an individual basis. Also, if you find that the union is harassing or intimidating you too much, I repeat that you should let us know.

Hopefully, the union will stop bothering all of us before very long and we can continue working together successfully as we have in the past.

Mr. Lazarich testified he had previously been approached by three or four employees who bitterly complained they had been visited eight to ten times at home by union organizers who refused to leave. According to Lazarich, Priebe had received similar complaints from eight or ten people.

9. The meetings described above should be put in context. Mr. Lazarich is stationed in Toronto and visits the Cambridge plant approximately once a week. He addresses the work force every couple of weeks, or whenever there is something important to discuss. Various witnesses mentioned several meetings which no one suggested had anything to do with the union. Reference has already been made to meetings held in November, 1982 and April, 1983 at which wages were discussed, and of the March, 1983 meeting concerning the "intimates" line. Others occurred on May 26th and June 21st or 22nd. All of these gatherings took place in the plant cafeteria during the morning or afternoon coffee break, and employees were notified by foreladies. Some of the meetings, the one on May 10th in particular, did not end

until five or ten minutes after the break was over. Foreladies and other management representatives were present at all gatherings.

10. On June 28th, Vogue received a copy of the union's application for certification and posted the required notices. Barbara Kirk, a sewing machine operator, read the notice to employees as soon as it was posted on June 28th, and then she paid a visit on Jim Priebe in his office which opens off the plant floor. She asked him what the notice was about; he told her it meant what it said and he couldn't tell her any more. Kirk testified Priebe told her to phone the Board if she had any questions. Jim Priebe apparently follows the open door policy described in Vogue's employee handbook. Kirk testified she visited his office once or twice a week with work-related problems. Dawna Martin said she went there at least once a day to discuss personal or employment matters, and she commonly walked through his office when passing from one part of the plant to another. In contrast, Berta Dias rarely goes to Priebe's office. Priebe testified that he spends most of his time on the plant floor. On June 28th, he told six or seven employees who approached him on the plant floor what he earlier had told Mrs. Kirk. Among this group were two petitioners – Dawna Martin and Fernando Machado.

11. Twenty-four hours after the notices were posted, four petitions, containing a total of eighty-seven signatures, had been circulated and mailed to the Board. Soon after speaking to Jim Priebe, Mrs. Kirk began to collect signatures on a work sheet normally used to record production. Two or three employees signed this sheet, but others refused to do so because there was no statement written on it. Consequently, Mrs. Kirk tore up this paper and obtained a piece of note paper. At the top of it she wrote: "we the employees of Vogue Brassiere do *not* wish to be represented by the International Ladis [sic] Garment Association". She obtained thirty-seven signatures during non-working hours – at coffee break and lunch, and before and after work. All but one person signed on the employer's premises, and the vast majority of these employees were approached on the work floor, rather than in the cafeteria or parking lot. Two people who declined to sign the work sheet signed the later petition. Twelve of the employees who signed Mrs. Kirk's petition are not fluent in English, and another employee translated the document for them.

12. Sally Machado, a sewing machine operator, testified Barbara Kirk asked her three times to sign a petition. The second contact occurred immediately after the afternoon break on June 28 as Ms. Machado was returning to her work station. According to Ms. Machado, on the third occasion she was seated next to Anna Suzza, a forelady, in the cafeteria at lunch time; but Mrs. Kirk stated the forelady was not present. Anna Suzza testified she sits beside Ms. Machado at lunch every day but leaves after ten minutes, and she did not hear Barbara Kirk speak to Sally Machado. Anna Suzza remains on the plant floor during coffee breaks, and she could not recall observing any unusual activity on June 28th or 29th. Sally Machado also testified she met Mrs. Kirk by chance in a doctor's office and was told by Kirk that she had been promised a quality control job by Jim Priebe. According to Mrs. Kirk, this promise was never made. Her version of the doctor's office conversation is that she said the sewing job she was then performing would broaden her experience and enhance her chances of obtaining a quality control job. Mr. Priebe was not questioned about this matter.

13. Dawna Martin is employed as a work mover. On the afternoon of June 28th, she learned Barbara Kirk was circulating a petition and decided to do the same. Martin collected twenty-four signatures on a sheet of paper with no statement written on it. As a work mover, Dawna Martin circulates around the plant. During working time on June 28th and 29th, she

spoke to people about the union and her petition, and invited them to contact her later if they wished to sign the petition. She told employees that the purpose of the petition was to ensure the union was not certified without a vote. Ms. Martin spoke to more employees than the number who signed her petition. According to Ms. Martin, employees signed this document during non-working hours on the plant floor. Instead of using the services of a translator, she simply left those employees who did not understand her.

14. France Mercier testified Janet Astley, a fellow employee, approached her during working hours on June 28th and asked her to sign a petition. According to Mercier, her refusal evoked an angry response. Then Dawna Martin appeared on the scene. Mercier described Martin and Astley as "pushy". France Mercier told them she didn't want to reveal her vote, because she needed her job, and Janet said one could not be fired for signing the petition. Dawna Martin followed Mercier to the time clock, suggesting she reconsider, and inquired again the next day just after Mercier started work. Ms. Mercier testified people were walking up and down the plant and were not doing there regular jobs on June 28th and 29th.

15. Berta Dias is also a work mover. She and Fernando Machado read the notice to employees at the same time and both decided to circulate petitions. Mrs. Dias' petition bore the following statement: "We do not want the International Ladies Garment Workers Union at 520 Collier MacMillian Dr. Vogue Brassiers. We like things as they are!!!!". Mrs. Dias obtained ten signatures in the cafeteria during non-working hours, but she did not witness ten additional signatures on the petition. It left her possession on more than one occasion, and was not always returned to her by the same person to whom she last delivered it.

16. Fernando Machado works as a trimmer. Her petition states: "we do not wish to have the International Ladies' Garment Workers' Union at the Cambridge plant of Vogue Brassiere Inc." Six people signed this petition during non-working hours, most of them in the parking lot.

17. Barbara Kirk undertook to transmit all of the petitions to Toronto. After work on June 28th, she learned that Berta Dias was circulating a petition, and Kirk spoke to Dias the next morning before work. At approximately 9:30 a.m., Mrs. Kirk asked Jim Priebe for permission to leave work to check on her mother who had recently undergone back surgery and was at home alone. According to Kirk, she asked at this time for permission to leave work once that morning and once in the afternoon, but Priebe testified she asked to leave in the morning only. She punched out between 10:00 and 10:30, visited her mother, and returned to work just before 12:00, failing to punch in until 12:30. At 12:30 she punched her card twice. Mrs. Kirk's normal practice is not to punch her card on leaving work at 12:00 and to punch it twice on returning at 12:30. At lunch on June 29th, Kirk learned from Dias that Machado also had a petition. Over the lunch break, Mrs. Kirk received the other petitions, and she again punched out at 12:50. After visiting her mother once more, Mrs. Kirk drove to her home where she phoned the Board and composed a covering letter, then she went to the post office and mailed the petitions. She returned to work just as the 3:30 buzzer sounded the end of the day. Mrs. Kirk testified she returned to the plant to speak to the other petitioners and to pick up her free garments. June 29th was the end of a pay period, and that afternoon Jim Priebe reviewed the employees time cards. He noticed that Mrs. Kirk's card had been punched three times between 12:00 and 12:50. According to Priebe, as he had not seen her since mid-morning, he deduced her card had been punched in error by someone else.

Although she had left before 10:30, he rounded off her leaving time to 10:30 and she was paid accordingly.

18. The degree of authority that work movers exercise over other employees was canvassed in evidence. Dawna Martin testified she moved materials from place to place and supplied employees with thread and elastic. Employees who have a problem with their machines tell her and she informs the forelady. When the forelady is away, she leaves instructions with Martin who speaks to Priebe if she cannot follow the instructions. France Mercier described a work mover as a forelady's helper and not a member of management, but testified Denis Coutu, the person in charge of technical operations at Cambridge, said Dawna Martin was the forelady when the regular forelady was away. However, Jim Priebe testified he and Coutu substitute for Martin's forelady with the help of a person from quality control.

III

19. The onus of demonstrating that a petition is voluntary rests with those who rely upon it: *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387. In the most blatant cases, the employer actively participates in the origination and circulation of the petition, but the Board is on guard against subtle variations on this theme, because the perceptions of employees are as important as the actions and motives of management. A petition may be tainted by employer conduct which is reasonably perceived to be motivated by anti-union sentiment even though it is not. See *Mitten Industries Galt Limited*, [1979] OLRB Rep. Mar. 154; *Hayes Steel Products Limited*, [1964] OLRB Rep. Apr. 30. Similarly, actions by petitioners which gave rise to a reasonable perception of employer support led the Board to discount a petition in *Baltimore Aircoil Interamerican Corporation*, *supra*.

20. Are the petitions in this case voluntary? The union advanced several reasons in support of a negative answer: the open circulation of those documents during working hours; the benefits conferred on employees by management in the course of the organizing campaign; and Vogue's communications with the work force. These objections apply to all of the signatures on all of the petitions. The union also took exception to some signatures on other grounds, but we need not address these submissions.

21. The union alleges the petitions were openly circulated on the employer's premises during working hours. Does the evidence support this contention? Almost all of the signatures on three of the petitions were obtained on the plant floor or in the cafeteria. In addition, Dawna Martin discussed the petition with employees at their work stations. As to time, Ms. Martin conceded these discussions occurred during working hours, although she insisted that everyone signed her petition while off duty. Barbara Kirk claimed employees affixed their signature to her petition during non-working time. However, Mrs. Kirk later admitted that she spoke to Sally Machado while both were on duty. According to France Mercier, the activities of the petitioners disrupted work procedures, but Anna Suzzza could recall nothing unusual occurring on the days in question. The plant manager and foreladies spend most of their time on the plant floor during the working day. Anna Suzzza testified that she remains there during coffee breaks and spends part of the lunch break in the cafeteria.

22. Having reviewed the evidence, we find that a reasonable employee might conclude that management was aware of and tacitly supporting the actions of the petitioners. This conclusion rests upon two grounds. First, the petitioners' activities occurred on the plant floor or

in the cafeteria within view of members of management. Secondly, those activities were carried on, at least to some degree, during working hours when the petitioners are generally subject to employer direction. Consequently, the manner in which the petitions were circulated may well have lead employees to believe that management would learn of their response to the petitioners.

IV

23. The union's other challenges to the voluntariness of the petitions focus more directly on the employer's conduct – making speeches and dispensing benefits. But even here the union did not allege that unfair labour practices were committed; rather, the contention was that the conduct in question tainted the petitions by creating a perception of employer interference.

24. An employer who dispenses largess with an intention to interfere with the selection of a trade union by employees contravenes section 64. The leading case on this point is *The Globe and Mail*, [1982] OLRB Rep. Feb. 82:

48. There is nothing in the Act which prohibits an employer whose employees are unorganized and who are not the subject of a union organizing campaign, from providing terms and conditions of employment which are designed to, and may have the effect of, 'promises or undue influence' as a means of thwarting the rights of the trade union and/or its employees. Once a trade union begins to organize, it is protected by the provisions of section 64 of the Act and the employer is prohibited from acting with an intention to interfere with the selection of a trade union or the representation of his employees by a trade union. The section enshrines the employer's freedom to express his views but makes it an offence to use 'coercion, intimidation, threats, promises or undue influence' as a means of thwarting the rights of the trade union and/or its employees. The granting of benefits or the solicitation of employee grievances during the course of a union organizing campaign if motivated even in part by a desire to undermine the trade union, breaches these prohibitions. Regardless of whether this type of activity is characterized as an attempt to threaten employees, as it has been by the United States Supreme Court in *Exchange Parts*, or as an attempt to make unlawful promises or as an attempt to unduly influence employees, it constitutes an unlawful interference with the trade union and with the right of employees to choose a trade union.

In a petition case, we are more concerned with the perception of employees than with the intention of management. Whatever the motive, an employer who displays uncustomary generosity during an organizing drive may create an impression of intentional management interference in the campaign.

25. The benefits conferred upon employees, between the onset of the union's campaign and the circulation of the petition, include a wage raise, increased OHIP contribution and free garments. There was nothing unusual about the wage increase in May, as rates of pay are customarily reviewed at this time of year. But we find the other benefits conferred by Vogue to be out of the ordinary. The increased contribution to OHIP went far beyond offsetting the

premium increase announced at the time by the provincial government, and there was no evidence to suggest that benefits had been adjusted in this manner before. Similarly, aside from weddings and wash and wear testing, employees had not previously received free garments. Although the gift was made to all employees, not just those at Cambridge, there was no evidence that the Cambridge employees were aware of this. A reasonable employee might well think the work force was being offered a bribe to reject the union. France Mercier did not see things this way, but the Board's role is to carefully consider the facts and to draw from them reasonable inferences about the reaction of the work force at large. In addition, employees may be reluctant to disclose, in the presence of their employer, perceptions which adversely effect management interests. For these reasons, the Board has generally refused to inquire into the subjective motivation of individual employees; see *Wolverine Tube*, 63 CLLC ¶16,296 (OLRB). We conclude the free garments and OHIP contributions may have improperly influenced employees to sign the petition.

V

26. The union also challenged the two speeches made by Mr. Lazarich. His remarks fall into several broad categories that have been considered by the Board over the years, often in the context of unfair labour practice proceedings. As we have already noted, the standards applied in the setting of a petition are different than those looked to when a statutory violation is alleged; but subject to this important caveat, the unfair labour practice cases do provide useful guidance. Indeed, counsel for Vogue relied heavily upon one such case decided under section 64 of the Act. That section provides:

No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

27. Perhaps the most common employer response to an organizing drive is a statement of opposition to unionization. The Board has held in numerous cases that the expression of such opinions does not violate section 64. The clearest explanation of the rationale for this result is found in *Playtex Ltd.*, [1972] OLRB Rep. Dec. 1027, at para. 5:

Apart from any electioneering or propaganda published by an employer, it is to be assumed that employees recognize that the employer is not usually in favour of having to deal with the employees through a trade union. Accordingly, it ought not be a surprise to the employees when the employer indicates that he would like to have the employees vote against the trade union. An invitation to employees to vote against the trade union delivered in writing in the absence of any surrounding facts or circumstances which would cause the employees to place undue emphasis on such statement cannot be characterized as undue influence within the meaning of section 56 of the Act. Indeed, employees might consider the fact that the employer is opposed to dealing with them

through a trade union as evidence of the fact that union representation would work to the detriment of the employer and to the advantage of the employees.

See also *Formfit International*, [1966] OLRB Rep. June 193; *Standard Brands Limited*, [1972] OLRB Rep. June 654; *Seven-Up (Ontario) Limited*, [1970] OLRB Rep. May 198; *Dylex Limited*, [1977] OLRB Rep. June 357; *Windsor Arms Hotel*, [1977] OLRB Rep. Nov. 859; *K-Mart Canada Limited*, [1981] OLRB Rep. Jan. 81.

28. Another management strategy is to attempt to convince employees that any advantages of collective bargaining are outweighed by the drawbacks. Among the topics typically touched upon are wages and benefits, on the one hand, and exclusivity and union security on the other. The employer may provide facts or invite employees to make their own inquiries concerning these matters. One way to attempt to convince employees that collective bargaining will bring small gains is to compare their wages and benefits to those prevailing elsewhere. This type of comparison has been upheld in several cases: *Imperial Eastman Corp. (Canada)*, [1964] OLRB Rep. Feb. 574; *The Globe and Mail*, [1982] OLRB Rep. Feb. 189; and *Toronto General Hospital*, [1983] OLRB Rep. Apr. 607.

29. Turning to the other side of the ledger, management may say that the certification of a bargaining agent will bring an end to dealings between the employer and individual employees. In *Playtex Ltd.*, *supra*, the Board condoned a statement to this effect:

4. Section 56 of The Labour Relations Act recognizes that an employer has freedom to express his views “so long as he does not use coercion, intimidation, threats, promises or undue influence”. In this case, the employer did not say anything in the letters addressed to the employees which could properly be characterized as coercion, intimidation, threat or promise. In addition, we are of the view that the statement that the relationship between the respondent and its employees would change in that the employees would no longer be able to deal with the employer on an individual basis and that the union would speak on behalf of the employees is substantially correct in so far as it refers to labour relations matters. A trade union, once certified, becomes the sole collective bargaining agent for all the employees in the bargaining unit and is entitled to represent the employees in their employment relationship with their employer. Accordingly, it cannot be said that the statement referred to above constituted undue influence.

30. An employer may also advise employees that collective agreements commonly require all employees to pay union dues and to be members of the union. Employees may also be told that to remain a union member in good standing they must abide by its constitution which may oblige them, under certain circumstances, to go on strike or pay a special assessment. This type of communication was held to be legal in the *Globe and Mail* and the *Toronto General Hospital*, cases, *supra*.

31. Employers often explain to employees the law relating to the certification process. They may be informed that a union can be certified on the basis of membership evidence without a vote, or that the outcome of an election is determined by a majority of those who

actually vote. Statements such as these were found to be lawful in the *Globe and Mail* and *Toronto General Hospital*, cases, *supra*.

32. To this point, we have been concerned with statements which convey information or invite inquiries about collective bargaining or the certification process. There can be no objection to a suggestion that employees investigate these subjects, as the knowledge gleaned can only enhance the wisdom of their ultimate decision. For the same reason, the Board has found that an employer may lawfully convey accurate information on these topics.

33. Even in the face of ambiguity exaggeration and falsehood, the Board has been reluctant to strike down campaign propaganda, issued by management or labour, relating to these subjects. The decision in *Alcan Building Products*, [1971] OLRB Rep. Dec. 806 is typical in this respect:

6. The facts of this case clearly established that the respondent confined its activities in this matter to paper propaganda where one party makes a statement and the other party attempts to refute that statement and comment on it. In the absence of threats or other elements of intimidation, the Board will not undertake to police or censor the propaganda used by participants in a representation vote, but leaves it to the opposing party to correct, and to the employees to evaluate, such propaganda. Exaggeration, inaccuracies, partial truths, name-calling, and falsehoods, while not condoned, may be excused as legitimate electioneering campaign propaganda provided they are not so misleading as to prevent the exercise of a free choice by employees in the representation vote.

7. In the instant case, the propaganda was published by the respondent well in advance of the taking of the representation vote and the applicant union had ample opportunity to answer any statements or allegations made against it. This case is distinguishable from the case where an employee addresses a "captive audience".

8. While the material published by the respondent may be open to challenge on the grounds of accuracy or exaggeration and may, when viewed by ardent supporters of the trade union, be interpreted as highly objectionable falsehoods and name-calling, because of the sensitivity of such supporters to any such activity on the part of an employer, we are of the view, however, that these statements, when viewed by the average employee, would be accepted as normal election propaganda to be expected from an employer. Such employees have the benefit of the leaflets distributed by the applicant union which counter-balance to a large degree the statements made by the respondent. We are of the view that the average employee has the mental capacity and the necessary experience to assess this type of propaganda in a proper way and would not be unduly influenced thereby. This fact is apparently recognized by the applicant union as can be seen from the manner in which the leaflets prepared by the union set out the union's position. The union's leaflets must be described as fair comment on the issues and are not inflammatory, abusive or an overstatement of the union's case. Union leaflets of this type rec-

ognize the mental capacity of the employees whom the union seeks to represent and in effect give credit for such capacity. However that may be, we are of the view that the facts of this case are such that it cannot be found that the activities of the respondent have destroyed the ability of the employees to freely express their views in the representative vote that was conducted.

See also *Stauffer Dobbie Manufacturing Co.*, 59 CLLC ¶18,147 (OLRB); *Valley City Manufacturing Company*, [1971] OLRB Rep. Dec. 113; *Systems Equipment Limited*, [1974] OLRB Rep. Aug. 510.

34. Under this approach, campaign statements are filtered through the political process not the legal process. Individuals are credited with the ability to recognize propaganda for what it is, and opponents are expected to challenge misleading comments made by the other side. These political checks are not fool proof, and employees are sometimes influenced in their choice by misstatements. The temptation is to invoke the legal process whenever this occurs; but the problem lies in deciding when the political process has failed. To identify a break down, one must ask several perplexing questions; is the challenged comment untrue; was it effectively rebutted by the other side; how many employees heard the statement; was their choice influenced by it? As the answers are seldom clear, the risk of error is high and litigation over these questions leads to cost and delay. For these reasons, labour relations boards generally defer to the political process, following the same tack taken in the larger political world of provincial and federal elections. See *Gibraltar Mines Ltd.*, [1975] 2 Can. LRBR 129 (BC L.R.B.). A comprehensive account of the rationale for this approach is found in Bok, "The Regulation of Campaign Tactics in Representation Elections under the National Labour Relations Act" (1964), 78 Harv. LR 217.

35. In summary, an employer is free to express opposition to a union, to comment about wages, benefits, exclusivity and union security, to describe the law and, within limits, to exaggerate and mislead. These activities are protected by the free speech proviso in section 64 and do not constitute an unfair labour practice.

36. But an employer who raises the spectre of a loss of jobs incurs a significant risk of running afoul of the law. In the most extreme case, management says the plant will be closed if the union is certified. Here the employer has undertaken, in no uncertain terms, to perform an act that is injurious to employees – cease operations – unless they do what management wants – reject the union. In this sense, the employer's conduct is like that of the extortionist who threatens to burn one's house unless paid a sum of money; a classic threat is made in both cases. A comment like this was not surprisingly found to violate section 64 in *Best Form Brassiere Company*, [1972] OLRB Rep. Aug. 785.

37. However, few employers are so vindictive, or narrow minded, as to close a plant just because employees choose a bargaining agent. This is not to say that management welcomes the entry of a union. Many employers, are concerned about the impact of collective bargaining on compensation and efficiency. They may project a drop in profits production and jobs, as a result of unionization. Although this course of action is sometimes called a threat, it is very different than the classic management threat described above. An employer who muses aloud about the relationship between unions and jobs is not proposing – and is not understood by employees to be proposing – to voluntarily terminate jobs if forced to deal with

a union. Rather, management is speculating that economic focus beyond its control will compel it to layoff employees if they embrace collective bargaining. The difference between the employer who threatens and the one who predicts is like the distinction between the extortionist who demands protection money and the dooms saying insurance agent who extracts a large fee by overestimating the risk of fire. Neither the speculating employer nor the insurance agent has threatened retaliation. The only possible cause for concern with the insurance agent is misrepresentation of present fact – i.e., statistics on fire frequency. But the employer has made a prediction about the future rather than a statement of present fact.

38. Predictions about the impact of collective bargaining on job security, made in the abstract during an organizing campaign, have almost invariably been held to be unlawful. In most cases, the reference to future employment was indirect or veiled, but the Board has not been hesitant to read between the lines, for the reasons expressed by the United States Supreme Court in *NLRB v. Gissel Packaging Co.*, 71 LRRM 2481 (1969):

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's right cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in s. 7 and protected by s. 8(a)(1) and the proviso to s. 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

39. We will review some of the Board's decision in which predictions of job loss were found to contravene section 64. In *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1849, the employer simply announced "we're a small plant and we really can't afford a union." See also *Summerville Belkin Industries Limited*, [1980] OLRB Rep. May 791. In *Viceroy Construction Company*, [1977] OLRB Rep. Sept. 562, management argued that the union could not insure job security and listed several unionized plants that had ceased operations. See also *Seneca Wire of Canada Limited*, [1966] OLRB Rep. Sept. 412. Less explicit references to job security have also been struck down. In *Stratton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801 the employer referred to continuous employment in the past and the possibility of a future loss of business if product prices were increased. The impugned statement in *Seven-Up (Ontario Limited)*, [1970] OLRB Rep. May 198 was very subtle:

You should note also that though we are an incorporated company and have to account to the shareholders and the government for our use of money – they, the union, are not bound to account publicly for what they do with your money. Do you know what they do with it?

Let's now consider a few of these benefits: (which employees have)

1) The right to talk to management about any grievance which you might have.

2) Promotions based on ability and seniority.

3) A standard work week with time and one-half for all overtime hours for all hourly paid employees.

4) Two paid 15 minute rest periods for all inside employees.

5) Generous vacations with pay with vacation selection based on seniority.

6) 11 plant holidays which are the same as those enjoyed by the industry in Toronto.

7) Ontario Hospital Service Commission premiums and Ontario Health Services Insurance Plan [sic] plus Blue Cross Extended Health Care Coverage premiums – 100% paid by the company.

8) A generous weekly indemnity plan being negotiated.

• • • •

10) Sharing of the cost of work clothing and footwear (in all departments where the situation warrants special clothing) and in the cost of cleaning these garments.

We want to grow together, in a harmonious and satisfactory way – with continuous employment and continuous income, week after week, throughout the years.

The Board's response was short and to the point:

Again, the letter also contains the following statement, “We want to grow together, in a harmonious and satisfactory way – with continuous employment and continuous income, week after week, throughout the years.” This statement read in the context of an anti-union letter would tend to imply that if the union became the employees' bargaining agent, employment might not be continuous and the employees might not have continuous income week after week throughout the years.

The United States Supreme Court followed much the same tack as this Board in *NLRB v Gissel Packing Co.*, *supra*,:

Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a “threat of reprisal or force or promise of benefit.” *He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of*

unionization. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20, 58 LRRM 2657 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. *We therefore agree with the court below that "conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof."* 397 F.2d. at 160, 68 LRRM 2720. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202, 65 LRRM 2987 (C.A. 2d Cir. 1967).

(emphasis added)

40. The only case cited by counsel for Vogue in which remarks about job security, made in the abstract, were found to be legal is *Greb Industries Limited*, [1979] OLRB Rep. Feb. 89. These comments were part of a longer letter delivered to employees:

In earlier letters, I have attempted to put forward some facts for your consideration and underline the importance of voting on November 14th. At this time, I would like to set out some further views.

It is my hope that within the available time you will be in a position to consider "both sides of the coin" before making a final decision for or against collective representation by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 879.

You are now aware that union organizers can and sometimes do make promises, regardless of whether or not they have any realistic hope of fulfilling these promises. Issues of job security and wage increases are often high on the list of a union organizer. The Company, on the other hand, is not free to make promises during this period. The matter of job security is, of course, the prime importance to both you and the Company. It cannot be guaranteed through promises or provisions in a Collective Agreement. Your security and the Company's well-being depends upon your efforts and the Company's ability to remain competitive in the market place.

In regard to benefits, I am sure that you are aware that your fringe benefits (i.e. Life Insurance, Major Medical and OHIP) are, as has always been our policy, identical to those negotiated for our manufacturing plants with the United Shoe Workers of America. Aside from these benefits, you are aware of our Job Progression/Job Posting Policy (in response to

your wishes) of advancing employees from the various warehouses to management positions in both Greb and Bauer Marketing, and in Manufacturing. In spite of our heavy monetary losses in the past 2 years, as you are aware, wages were adjusted to the maximum that the Company could afford.

You may think that negotiations are a mere formality, resulting in improvements promised by the Union plus a guarantee of all existing working conditions. This is not correct. It is true, that following an application for certification and, where a union has been certified and given notice to bargain, an employer may not unilaterally “alter the rates of wages or any other term or condition of employment or any right, privilege or duty” until either a collective agreement has been signed or the rights to strike occurs.

(Incidentally, this restriction applies to improvements as well as curtailments). It should be made clear, however, that any settlement finalizing terms and conditions of employment in a Collective Agreement is a product of negotiations and mutual agreement between the Company and the Union which may take place over a period of months following certification.

Although I am new on the scene, I am well aware of the tremendous problems that have faced this Company in the past 2 years. Difficult and agonizing decisions at Greb and in the total footwear industry have had to be made because of the decline in our total economy. As you will note in Andre Morissette’s letter of October 31, 1978, a copy of which was posted on your bulletin board, CEMP and myself are committed to turning this Company around and I will be looking for suggestions as to ways and means of improving our operations along with your total commitment.

In closing, I repeat that those of you in the defined bargaining unit are directly affected by the result of the vote. That is, if the Union is certified then by law, it must represent all employees in the bargaining unit and not just those who are members or who have supported the Union. The Union will be certified if it obtains a bare majority of those employees who actually cast ballots on November 14th. You must, therefore, exercise your right to vote so that the final determination in this matter will be based on the views of a majority of employees.

The Board found this letter to be lawful, noting that the employer “did not pressure its employees to attend a captive audience session in order to adumbrate its point of view” (para. 13).

41. Not all remarks about future employment are made in the abstract. A good example is an employer’s comment on its ability to pay the rates set out in a standard agreement. In *Tamblyn-Pritchard Construction Ltd.*, [1967] OLRB Rep. June 282, the union which already represented the employer’s work force engaged in commercial construction sought to organize

employees who built houses. Management declared “it would not be economical for the company to remain in business [the residential construction] if it were necessary to pay union rates” in the existing commercial agreement.” No unfair labour practice was found.

42. Why does the Board scrutinize statements about future job loss so carefully? An employer’s predictions about job security exert a large influence over employees. An employer is in a much better position than employees, and usually a union also, to know about the economics of an enterprise and an industry. Consequently, there is no effective check on the reliability of management statements on job security, as there is on topics such as wages paid by competitors. More important, comments about future employment strike at the heart of the most critical employee interest. A limitation on predictions made during an organizing campaign would shield employees from management influence. But might this approach also unduly restrict an employer’s freedom of speech and deprive employees of valuable information?

43. A discussion of free speech in relation to job security should also recognize that a certification campaign is only the first step in the collective bargaining process. Because the union typically has not tabled its bargaining proposals at this stage, the impact of unionization is highly uncertain, and an employer may be inclined to fear the worst. There is a built-in incentive for an employer to overstate its concerns – particularly in relation to production levels and the associated number of jobs – when making predictions in the abstract. The larger the problem is portrayed to be, the less likely employees are to support the union. In the American context, Professor Bok has remarked that “after reading the Board’s decisions, one could hardly avoid wondering ... whether every employer who spoke of having to move his plant for economic reasons was actually sincere in making such predictions” (*supra*, at 254). The uncertainty that generates these difficulties recedes when the parties approach the bargaining table. The union’s proposals now provide a concrete focus for a debate about the effect of collective bargaining upon employment. Consider an employer who throws open its books to disclose a financial picture so bleak that acceptance of the union’s terms would lead to insolvency. Management should not be barred from conveying this information to employees during negotiations. Postponing communication to this stage does not substantially prejudice either employers or employees. Although by this time a certificate has already been issued to the union, certification is only a licence to bargain; and, in the final analysis, a trade union cannot win contract demands without the continuing support of employees. An employer who contends during negotiations, on the basis of objective fact, that labours’ proposals point the way to a loss of jobs has ample opportunity to persuade employees to reduce their demands. This analysis strongly supports the approach taken by this Board in the cases reviewed above. As to the propriety of communications at this stage, see *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583.

44. We turn now from the content of an employer’s message to the medium by which it is delivered. The term captive audience has frequently been applied to meetings convened by management during working hours. Although the Board has refrained from holding a speech delivered at such a gathering to be a per se violation, the existence of a captive audience has often been relied upon in conjunction with the speakers comments, to find an unfair labour practice. See, for example, *Sun Tube of Canada Limited (Ottawa)*, [1962] OLRB Rep. Apr. 28; and *Bell & Howell Canada Ltd.*, [1968] OLRB Rep. Oct. 695. Conversely, the absence of a captive audience has been cited as a reason for not finding a violation of section 64. See *Greb Industries Limited*, *supra* and *Alcan Building Products Limited*, *supra*.

45. The rationale given by the Board for looking askance at captive audiences is that employees who are required to attend a meeting may readily conclude they are expected to adhere to the employers views stated there. See *Mitten Industries Galt Limited*, [1979] OLRB Rep. Mar. 154. Commentators have noted two other possible objections to captive audiences. Employees are not free to refuse to listen to the employer in this forum, whereas in our society freedom of speech is generally counterbalanced by freedom not to listen. In addition, the vehicle of a captive audience is available only to management: a union rely upon contacts outside the work place, a strategy which may be particularly burdensome in large bargaining units. Labour law scholars have identified the third concern as the most important.

The point is not that the union and the employer have the same right to deny each other permission to address employees assembled in their respective “forums”; rather, it is that the employer has the power, derived from the employment relation, to compel employees to listen, and that the union has not. It cannot make employees come to the union hall to hear a pre-election exhortation, even assuming the unlikely fact that there is often such a meeting place conveniently at hand. (Aaron, “Employer Free Speech: The Search for Policy” in Shister et al (Eds), *Public Policy and Collective Bargaining* (1962), at 51.)

See also *Bok, supra*. As the Board does not have a broad mandate to ensure equal access to employees, we doubt that this rationale can be invoked under the *Labour Relations Act*.

46. We have already observed that employer conduct that does not constitute an unfair labour practice may taint a petition. With this observation in mind, we turn to assess the effect of Vogue’s communications on the voluntariness of the petitions in this case. Counsel for the union challenged Mr. Lazarich’s speeches on three grounds: misrepresentations about union security; references to layoffs and plant closings; and the assembly of captive audience. As to union security, counsel contested a passage from the June 16th speech: “Have you asked the union how much your dues would be if they become certified? Find out before its too late.” Counsel contended that those remarks implied that all employees would have to pay dues as soon as the union obtained a certificate, and that this implication is not true. We find nothing improper in the employer’s comments which are in our view substantially accurate. Most certified unions do achieve first contracts. Most collective agreements require employees to pay dues; section 48 of the Act grants this type of union security arrangement to any bargaining that requests it be included in a collective agreement.

47. The reference to job security was made in the May 10th speech:

All of these factors combined have enabled us to weather the storm during the recent recession in better condition than many other employers. We have been able to avoid the same kinds of lay-offs and plant closures which have been experienced by many other companies.

Some of the “factors” which figured prominently in the earlier part of the speech are related to the absence of the union – the earlier vote which it lost and the employer’s dealings with individual employees. Employees might reasonably have understood Mr. Lazarich to be saying that the absence of the union contributed to their continued employment in the past. They might also reasonably have thought the employer was predicting that the certification of the

union would lead to a loss of jobs in the future. Mr. Lazarich did not explicitly deliver that message, and may not have meant it, but that did not necessarily prevent employees from reading it between the lines. The message which we have identified speculates that collective bargaining will impair job security. This statement is made in the abstract, and is not addressed to an industry-wide contract or to a union's wage proposals. The meeting on May 10th began during a coffee break and continued into working time; the audience was captive at least toward the end. In this setting, these remarks exerted an influence that colours the petitions.

48. On the balance of probabilities, we conclude the petitioners have not demonstrated that the employees who signed the petitions were not motivated by a perception of employer interference. This conclusion rests upon the manner in which the petitioners conducted themselves, the benefits conferred on employees by Vogue, and the employer's remarks about job security.

49. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER J. A. RONSON;

1. Shortly after the completion of hearings on the issues in this case the parties were notified that the Board did not consider the Statements of Desire to be a voluntary expression of opinion by the employees whose signatures appeared thereon. The Board was then notified that the parties had reached a settlement on all other outstanding issues. The settlement did not affect any of the allegations made by the trade union with respect to whether or not the Statements of Desire were "voluntary".

2. I agree with my colleagues that the manner, method and place of the taking up of signatures by the petitioners do not satisfy certain long-established criteria expressed in numerous cases of the Board dealing with such statements. That finding is enough to disallow the documents as being voluntary Statements of Desire. In view of the settlement and with harmonious labour relations between the parties as my intent, I feel that nothing further would be gained or served by commenting on the remaining allegations of the union. In this respect I differ with my colleagues.

0454-83-OH Robert Zizek, Complainant, v. Wilco Canada Inc., Respondent

Health and Safety – Employee warned twice for not wearing air hat when entering lead-pot – Later required to enter lead-pot with only face mask as air hat being repaired – Whether refusal because of safety concern – Suspension not justified – No duty to “work now and grieve later” where safety concern

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members J. Murray and H. Kobryn.

APPEARANCES: *Jerry Flynn, Larry Gauthier and Robert Zizek for the complainant; Robert B. Wilson for the respondent.*

DECISION OF THE BOARD; October 27, 1983

1. This is a complaint under section 24 of the *Occupational Health and Safety Act*.
2. The respondent employer operates a plant in the City of London. In its manufacturing process the respondent makes considerable use of lead. Lead is highly toxic, and excessive exposure to air borne lead can result in serious illness. The complainant, Mr. Robert Zizek, is employed by the respondent as a tube mill assistant. As part of his job, Mr. Zizek is at times required to go into the “lead pot”, where the risk of inhaling air borne lead is particularly great. On February 1, 1983 an “air hat” which the respondent had specified must be worn in the lead pot was not available, and Mr. Zizek was directed to instead perform the work wearing a small face mask and a face shield which would afford him less protection. Mr. Zizek refused this direction and in consequence was suspended for three days. It is Mr. Zizek’s contention that the respondent disciplined him for refusing to perform work he reasonably believed to be unsafe, and that by so doing the respondent contravened the terms of the Act. Mr. Zizek now seeks to be compensated for the three days that he was suspended, and to have any reference to his suspension removed from his personnel file. The respondent for its part contends that Mr. Zizek’s refusal to do the work involved was not motivated by any health or safety concerns, but only by an unjustified fear of being disciplined for not wearing the air hat. Accordingly, contends the respondent, Mr. Zizek’s refusal to do the work was not protected by the Act.
3. The relevant provisions of the Act are set out below:

“23.-(3) A worker may refuse to work or do particular work where he has reason to believe that,

 - (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;
 - (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
 - (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the

regulations and such contravention is likely to endanger himself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker, and if there is such, in the presence of one of,

(a) a committee member who represents workers, if any;

(b) a health and safety representative, if any; or

(c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them, who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

(a) the equipment, machine, device or thing that was the cause of his refusal to work or do particular work continues to be likely to endanger himself or another worker;

(b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or

(c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision, in writing, as soon as practicable, to the employer, the work, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

(a) assigns the worker, reasonable alternative work during such hours; or

(b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.”

“24.-(1) No employer or person acting on behalf of an employer shall,

(a) dismiss or threaten to dismiss a worker;

(b) discipline or suspend or threaten to discipline or suspend a worker;

(c) impose any penalty upon a worker; or

(d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 89 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications, as if such section, except subsection (5), is enacted in and forms part of this Act.”

4. Mr. Zizek’s testimony indicates that he commenced his employment with the respondent towards the end of 1981. At the time, there was a growing concern among both the respondent’s management and officials of the Ministry of Labour’s Occupational Health Branch with the extent to which employees were being exposed to air borne lead. In November and December of 1981, management posted notices to employees dealing with lead exposure in

which management voiced a concern with the fact that many employees were not following established procedures designed to limit the risk of excessive exposure.

5. In early 1982, a medical consultant with the Occupational Health Branch advised the respondent that employees were being exposed to excessive amounts of lead. The respondent then sought the assistance of the Industrial Accident Prevention Association of Ontario. The association concluded that the excessive exposure of employees to lead was the result of both the procedures being utilized by the respondent, as well as the improper use of equipment by employees.

6. On April 5, 1982, Mr. G.R. Wilson, the respondent's president, issued the following notice to employees. Among other matters, the notice acknowledged that a number of employees had received lead poisoning. We gather that the employees involved were placed on Workmen's Compensation.

"NOTICE TO EMPLOYEES

Dear Employee:

I want to assure you, that I am personally concerned for those employees who received Lead Poisoning. These conditions should never occur, as it is the responsibility of Management and Supervision along with yourself that you wear proper protection glasses, respiratory masks around the lead furnaces and that you ensure that the area is clean and fumes are not escaping from furnaces.

Under "NO" Circumstances are you to work in unsafe conditions that will affect your health. Wearing the proper equipment supplied, maintaining a clean environment and ensuring that "Your" personal hygiene, both to and from the job, at breaks and in the Company cafeteria, will ensure you and your family that a safe environment and work place is had.

I am directing strict and tough disciplinary actions for Employees, Management or Supervision who work *or* direct Unsafe and Unhealthy work conditions and also do not maintain good levels of Personal Hygiene.

Both Management and Employee's have a responsibility to themselves and to Government legislation to work and perform in a safe and healthy work environment.

Be assured that recent Press quotes on "Plant Closures" will *NOT* take place as this office intends to ensure you, the Employee, and Government that good safe and healthy work conditions prevail."

7. At some point during 1982, (the exact date was not referred to in evidence), it became a requirement that employees have their urine tested for lead on a monthly basis. The frequency of the tests was later increased to once a week.

8. Until mid 1982 employees working in the lead pot wore a small face mask (3 M #9920 dust/fume/mist respirator) and covering shield. On or about June 25, 1982 the Occupational Health Branch directed that employees working inside the respondent's furnaces (which apparently included the lead pot) be supplied with a powered air purifying respirator. A copy of this direction was not filed with the Board. In response to the direction the respondent acquired a 3-M "air hat" or "respirator helmet" model #W2940. The air hat completely covers an employee's head, and is equipped with a battery powered air pump and filter. On or about November 23, 1982, the following memo from Mr. F. Tchorek, the respondent's safety co-ordinator, was posted on the respondent's bulletin boards:

"The Ministry of Labour will be collecting air samples for the next three working days. Two points were brought to our attention by the technicians.

A.) The 3 M air hat must be worn by all personnel who are required to open the doors of the lead ovens, for whatever reason. This is by the orders of the ministry as a result of the last air monitoring.

B.) All personnel who are in the lead toxic area are required to wear the 3 M 9920 masks properly as shown on instructions. This includes people just walking through the area. This is an internal procedure and must be adhered to.

Please ensure that these procedures are being strictly adhered to, and remind all personnel that it is for their own benefit and well being and not ours.

Thank you for your co-operation in this matter."

9. Throughout 1982 the company had experienced an on-going problem in getting employees to properly follow safety rules, including rules about wearing proper safety equipment. This problem was highlighted by a report released in January of 1983 indicating that on November 23, 24 and 29, 1982 officials of the Occupational Health Branch had observed a number of the respondent's employees breaching company rules about wearing appropriate equipment. Mr. Zizek was one of these employees. On a number of occasions, he had been seen wearing a small face mask instead of the air hat, and at other times improperly wearing a face mask. On November 23, 1982, prior to release of the report of the Occupational Health Branch, Mr. Zizek was given a written warning by the respondent for not wearing the proper protective equipment while working in the lead pot. We gather that management had observed Mr. Zizek working in the lead pot wearing only a small mask and face shield instead of the air hat. The warning given to Mr. Zizek read as follows:

"Contrary to plant General Rules Section 1 Page 26 and Plant Safety Rules Section 11 Page 31 did not wear proper protective equipment when working in lead pot."

10. On November 29, 1982, Mr. L. Brush, the respondent's manufacturing manager, had the following notice posted on the respondent's bulletin boards:

“It is evident that there is still an unsatisfactory level of enforcement of health and safety regulations, particularly in the London Plant, and especially at the back end of the Tube Mills.

Three times in the last three weeks I have personally observed people not wearing or not properly wearing protective apparel at the back end of the Tube Mills, and I haven’t been in the area on a regular basis by any means. In each case, the instance was brought to the attention of the supervisor (S. Goodbrand – twice; A. Simoes – once). Furthermore, some people are not wearing smocks or coveralls as and where designated (Wilcote, Fabrication areas, including Quality Assurance personnel). In addition, there are too many minor accidents or injuries due to carelessness or failure to follow operating procedures.

There is absolutely no excuse for these continued violations of the regulations. All personnel have been well and thoroughly informed of the regulations, the rationale behind them, and the need for their enforcement. People are our most important asset and their health and safety must be protected, whether they like it or not. Adherence to the health and safety regulations is a condition of employment and is to be strictly enforced.

Since words alone have not achieved the necessary results, the following procedure is in effect immediately. All personnel, including supervisors for non-enforcement, are to be verbally corrected and counselled on the first occurrence, written up the second time, suspended the third, and terminated the fourth. There are to be no exceptions, other than blatant disregard for the regulations which could result in immediate discipline up to and including discharge.”

11. On January 12, 1983 Mr. Zizek was given a verbal warning, for wearing a small face mask into the lead pot instead of the air hat. The warning, although verbal, was recorded on a warning form which Mr. Zizek was required to sign. The form stated, in part, as follows:

“Reason for warnings, suspension or termination:

not wearing protective face mask with respirator when going into lead pot. This is a safety hazard and will not be tolerated.”

This was the last time that Mr. Zizek failed to wear the air hat when working in the lead pot. At the hearing, Mr. Zizek testified that due to a concern for his health, on a number of subsequent occasions when the air hat was not available, he declined to go into the lead pot area, but instead arranged to have a fellow employee do the work.

12. The events giving rise to these proceedings occurred on the midnight shift on February 1, 1983. On the previous day the air hat had been taken out to be repaired and was not available. Mr. G. Jamieson, an employee member of the plant health and safety committee who had been on the shift previous to the one worked by Mr. Zizek, testified that due to the

unavailability of the air hat he had refused to go into the lead pot and had not been disciplined for doing so. According to Mr. Jamieson, at the end of his shift he advised Mr. Zizek of his refusal to go into the lead pot and indicated that Mr. Zizek would be wise to follow his example.

13. At the start of Mr. Zizek's shift, Mr. William Barnes, the respondent's production supervisor, who also served as the chairman of the respondent's health and safety committee, directed a lead hand to advise the employees that the air hat was being repaired and that, accordingly, they would be required to go into the lead pot wearing a small face mask and shield. Mr. Zizek advised the lead hand that he would not do so. Eventually Mr. Zizek and Mr. Barnes met in Mr. Barnes' office to discuss the matter.

14. During the course of a shift, an employee might normally be required to work in the lead pot four or five times for about seven minutes each time. On the day in question, however, Mr. Barnes advised Mr. Zizek that due to the lack of the air hat the work would be rotated among a number of employees, and that in these circumstances, since it was only being done on a temporary basis, it would be safe for him to wear only a face mask and shield. Mr. Zizek's response was that he would not go into the lead pot without the air hat. There was some discrepancy in the testimony concerning the remainder of the conversation. Mr. Barnes testified that Mr. Zizek explained his refusal by stating that he had already been written up twice for not wearing the air hat, and that he did not want to be written up again. According to Mr. Barnes, at no time did Mr. Zizek say that he was concerned for his health. For his part, Mr. Zizek testified he had understood that if he went into the lead pot again without wearing the air hat he might be suspended or fired, and he remarked on this to Mr. Barnes, but that in addition he also told Mr. Barnes that he would not do the work because of health concerns.

15. As already noted, Mr. Zizek's refusal to go into the lead pot resulted in him being sent home and given a three day suspension. Mr. Zizek was advised of his suspension by way of a copy of the following memorandum to his personnel file written by Mr. L. Brush, the respondent's manufacturing manager:

“Sent home for balance of shift February 1, 1983 for refusal to service lead oven using standard face mask versus respirator helmet, and hence refusing a direct order.

Employee objected on grounds he had been disciplined twice recently (Nov. 23/82 & Jan. 12/83) for not wearing the helmet and hence to service the oven without the helmet was an unsafe act.

The helmet was not available for use on part of the employee's shift because it was removed for repairs.

Continued servicing of the oven without the helmet is unsafe in that blood lead content levels will eventually rise to unsafe levels. However, use of the mask only is not unsafe if this is done only rarely and not on a continuing basis.

The employee had to be forced to use the helmet in the first place and thus cannot be overly concerned for his health. Nevertheless, the company rule is that the helmet is to be used on a continuing basis; masks only being used in emergencies, e.g. breakdown of the helmet, and, when used as such, is not an unsafe act.

The employee should have followed the supervisor's orders and grieved later.

The employee is subject to discipline including discharge.

The employee is suspended for three (3) days, including the shift during which he was sent home."

16. As a result of his being sent home, the grievor contacted the London office of the Occupational Health and Safety Division of the Ministry of Labour, which sent out an inspector to investigate the matter. In a written report, the inspector concluded that "the work assigned to Mr. Zizek was likely to endanger him".

17. Before the Board Mr. Zizek testified that one of the reasons why he had refused to work in the lead pot without the air hat was a concern for his health. Respondent's counsel contended that no weight should be given to this testimony, and in this regard he noted that in the past Mr. Zizek had gone into the lead pot without the air hat even when it was available. Counsel also contended that the work was in fact safe, and it would have been unreasonable for Mr. Zizek to believe otherwise. In this regard, Counsel noted that Mr. Barnes had advised Mr. Zizek that the work was safe, and that Mr. Barnes was the chairman of the respondent's health and safety committee. The respondent's counsel also relied on a document issued by the Occupational Health Branch on January 21, 1982 setting out certain maximum permissible levels of exposure to concentrations of air borne lead. It was counsel's contention that these maximum concentrations would not have been exceeded if Mr. Zizek had done the work without the air hat. Both Mr. Frank Tchorek, the respondent's safety director, and Mr. Barnes testified that they believed that the January 21, 1982 document had been posted at the relevant time, although they were not positive that such had been the case. Mr. Zizek testified that even if the document had been posted, he had been unaware of the part being relied on by the respondent. It is clear that on February 1, 1983, Mr. Barnes in his discussions with Mr. Zizek did not refer to the January 21, 1982 document. At the hearing, the respondent filed a report from a medical consultant with the Occupational Health Branch dated January 21, 1981, which we gather is the document in question. The report sets out certain acceptable levels of maximum exposure of employees to air borne lead and also refers to the use of respiratory equipment. The report does not, however, specifically refer to the type of equipment that should be worn in the lead pot.

18. When sections 23 and 24 of the *Occupation Health and Safety Act* are read together, it is clear that an employee who has reasonable cause to believe that working conditions are unsafe has the right to refuse to work, and as long as his refusal conforms to the conditions of the Act, he may not be disciplined. Where the conditions set out in the Act have been met, an employee is not under an obligation to "obey now and grieve later" as suggested by Mr. Brush in his memorandum suspending Mr. Zizek for three days. Instead, the employee is legally entitled to refuse to perform the work.

19. As the Board noted in the *Inco Metals Ltd.* case [1980] OLRB Rep. July 981, the right of an employee to refuse work does not depend on whether there is in fact any danger to his health or safety. The question is whether at the time an employee refuses to perform work he has reasonable cause to believe that it is unsafe to do so. On the evidence, we are led to conclude that Mr. Zizek would have had reasonable grounds for believing that to work in the lead pot without the air hat would have been unsafe. In this regard, there had been a number of warnings to employees about the dangers of excessive exposure to lead, and several employees had actually contacted lead poisoning. On or about November 23, 1982 the respondent had posted a notice indicating that the Ministry of Labour had ordered the wearing of the air hat, and on the same day Mr. Zizek had been disciplined for not doing so. On November 29, 1982 Mr. Brush had posted a notice setting out a procedure under which employees and supervisors who did not follow or enforce rules regarding the wearing of proper safety apparel would be disciplined up to and including discharge. In accordance with this procedure, on June 12, 1983 Mr. Zizek had again been disciplined for not wearing the air hat this time with the express comment that he had committed a "safety hazard (that) will not be tolerated". All of these events would have led a reasonable employee to conclude that working in the lead pot without the air hat was unsafe. In reaching our determination that Mr. Zizek would have had reasonable grounds for believing the work to be unsafe, we have not given much weight to the fact that Mr. Barnes, the chairman of the health and safety committee, told Mr. Zizek that the work was safe, since at the relevant time Mr. Barnes was clearly acting only in his capacity as the respondent's production manager. In addition, Mr. Jamieson, an employee member of the health and safety committee, had already recommended to Mr. Zizek that he not go into the lead pot. We have also not given much weight to the January 21, 1982 report of the medical consultant with the Occupational Health Branch. Even if Mr. Zizek had read the document, because of the manner in which it was written, it would not likely have been of much assistance to him in assessing what equipment was appropriate for the lead pot. In addition, the Occupational Health Branch's direction that an air hat be worn in the lead pot was issued in June of 1982, subsequent to the January 21st report.

20. Not only did Mr. Zizek have reasonable grounds for believing it would be dangerous to go into the lead pot without the air hat, but we accept his evidence that this is what in fact motivated his refusal to do so. While Mr. Zizek had on earlier occasions failed to wear the air hat when it was available, we find it quite reasonable and accept his evidence that in the period leading up to February 1, 1983, he had developed a heightened concern about the problem of lead poisoning. In this regard, he was no different than both the Occupational Health Branch and the respondent, both of which were apparently becoming ever more concerned about the effect of lead on the respondent's employees. Given this growing concern and the respondent's continuing attempts to raise the consciousness of employees such as Mr. Zizek to the problems associated with exposure to lead and the need to wear proper protective equipment, it was quite reasonable for Mr. Zizek to being to demonstrate a heightened concern for this own health.

21. Having regard to the above, we are satisfied that pursuant to section 23(3) of thr not wearing the air hat. We do not believe that at the hearing either gentleman was seeking to mislead the Board it would endanger his health. Section 23(4) indicates that upon refusing to do particular work, an employee is to report the circumstances of his refusal to his employer or supervisor. As already noted, it is Mr. Zizek's contention that he explained to Mr. Barnes that concern for his health was part of the reason for refusing to do the work, whereas Mr. Barnes testified that Mr. Zizek referred only to a concern that he might again be dis-

ciplined for not wearing the air hat. We do not believe that at the hearing either gentleman was seeking to mislead the Board. Rather, both were trying to recall as accurately as possible what it was that was said. On balance, we have decided that Mr. Zizek's recollection of what was said to be the more accurate. We base this decision in large measure upon the memorandum dated February 1, 1983 written by Mr. Brush, the manufacturing manager. Mr. Brush was not directly involved in the events in question, and it is reasonable to infer that his information concerning what occurred came from Mr. Barnes at a time when the events were still fresh in Mr. Barnes' mind. Part of the memorandum (which is quoted above in full) states:

"Employee objected on grounds he had been disciplined twice recently (Nov. 23/82 & Jan. 12/83) for not wearing the helmet *and hence to service the oven without the helmet was an unsafe act.*"

(emphasis added)

This statement leads us to conclude that Mr. Zizek did in fact mention his safety concerns to Mr. Barnes when refusing to perform the work in question, and that accordingly, his refusal met all of the requirements set out in the Act.

22. Section 23 stipulates that when an employee refuses to work, the employer is to investigate the refusal in the presence of the employee and one of the people referred in subsection (4). This was not done. Rather, Mr. Zizek was sent home. Mr. Barnes testified that Mr. Zizek was sent home because there was no other work available for him. We have some difficulty with this contention in that Mr. Zizek had only been expected to spend a relatively small part of his shift in the lead pot. Further, in accordance with the terms of the Act, the respondent, rather than sending Mr. Zizek home, should have conducted an investigation into the matter in Mr. Zizek's presence, for which time he would have been entitled to be paid. In addition, Mr. Brush's memorandum indicates that the respondent characterized the February 1st shift as being part of Mr. Zizek's suspension for refusing to work in the lead pot and not the result of the unavailability of any work. Given these considerations, we are led to conclude that the respondent did not have proper grounds for sending Mr. Zizek home on February 1, 1983. We are also satisfied that the respondent's action in suspending Mr. Zizek was in violation of section 24(1) of the Act. In the result, the respondent is directed to compensate Mr. Zizek for his three day suspension, and to remove any reference to the suspension from Mr. Zizek's personnel file.

23. The Board will remain seized of this matter in the event there is any disagreement as to the amount of compensation payable to Mr. Zizek.

CASE LISTINGS SEPTEMBER 1983

	Page
1. Applications for Certification	
(a) Bargaining Agents Certified	197
(b) Applications Dismissed	207
(c) Applications Withdrawn	208
2. Applications for Declaration of Related Employer	209
3. Sale of a Business	209
4. Applications for Declaration Terminating Bargaining Rights	210
5. Applications for Declaration of Unlawful Strike	210
6. Applications for Declaration of Unlawful Strike-Construction Industry	211
7. Complaints of Unfair Labour Practice	211
8. Applications for Consent to Early Termination of Collective Agreement	211
9. Applications for Consent to Prosecute	215
10. Jurisdictional Disputes	215
11. Applications for Determination of Employee Status	215
12. Complaints under the Occupational Health and Safety Act	215
13. Colleges Collective Bargaining Act	215
14. Construction Industry Grievances	215
15. Applications for Reconsideration of Board's Decision	221

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1983

BARGAINING AGENTS CERTIFIED

No Vote Conducted

2176-82-R: Labourers' International Union of North America, Local 183, (Applicant) v. Heath Development Corporation, c.o.b. as Heath Residences, (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 325 Bogert Avenue, Willowdale, Ontario including Resident Superintendents, save and except Property Manager, persons above the rank of Property Manager, persons employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2340-82-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Winchester Cheese Incorporated, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Winchester, Ontario, save and except foremen and persons above the rank of foreman, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (88 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period by the respondent at Winchester, Ontario save and except foremen, persons above the rank of foreman and office staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

2412-82-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Pepsi-Cola Bottling Company of Ottawa, (Respondent).

Unit: "all employees of the respondent at Ottawa, Ontario, save and except supervisors, foremen, persons above the rank of supervisor and foreman, office staff, persons employed for not more than 24 hours per week, students employed during the school vacation period, and employees covered by a subsisting collective agreement." (8 employees in unit). (*Having regard to the agreement of the parties*).

2660-82-R: Ontario Public Service Employees Union, (Applicant) v. Cottage Hospital (Uxbridge), (Respondent).

Unit #1: "all employees of the respondent at Uxbridge, save and except professional medical staff, graduate and undergraduate nurses, paramedical employees, department heads, persons above the rank of department head, ambulance supervisor, secretary to the administrator, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (41 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent at Uxbridge regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, graduate and undergraduate nurses, paramedical employees, department heads, persons above the rank of department head, ambulance supervisor, secretary to the administrator and

persons covered by subsisting collective agreements.” (18 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2743-82-R: Ontario Public Service Employees Union, (Applicant) v. Family Service Association of Metropolitan Toronto, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent in Metropolitan Toronto, save and except Regional Directors, persons above the rank of Regional Director, Secretary to the Director of Community Services, Bolton Camp Secretary, Secretary to the Personnel Administrator, Secretary to the Executive Director, Illahee Camp Secretary, Administrative Assistant – Accounting, and persons regularly employed for not more than twenty-four hours per week.” (82 employees in unit).

Unit #2: “all employees of the respondent in Metropolitan Toronto, regularly employed for not more than twenty-four hours per week save and except Regional Directors, persons above the rank of Regional Director, Domestic Response Team Project Manager, Secretary to the Director of Community Services, Bolton Camp Services, Bolton Camp Secretary, Secretary to the Personnel Administrator, and Secretary to the Executive Director.” (26 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0022-83-R: United Steelworkers of America, (Applicant) v. United Cooler (Niagara 1980) Ltd., (Respondent).

Unit: “all employees of the respondent in the City of St. Catharines, save and except foremen, persons above the rank of foreman, office and sales staff, part-time employees and students employed during the school vacation.” (20 employees in unit).

0206-83-R: Graphic Arts International Union, Local 211 Toronto, Ontario, (Applicant) v. Haughton Graphics Limited, (Respondent) v. Objecting Employees, (Interveners).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen and persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (82 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0213-83-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Walden, (Respondent).

Unit: “all employees of the respondent in the Town of Walden, Ontario, save and except foreman, those above the rank of foreman, arena supervisor, office, clerical and technical employees, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (64 employees in unit). (*Having regard to the agreement of the parties*).

0214-83-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Walden, (Respondent).

Unit: “all office, clerical and technical employees of the Respondent in the Town of Walden, save and except Deputy Tax Clerk, persons above the rank of Deputy Tax Clerk, Assistant Roads Commissioner, Assistant Parks and Recreation Director, Secretary to the Mayor, Secretary to the Clerk Administrator, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (9 employees in unit). (*Having regard to the agreement of the parties*).

0582-83-R: Christian Labour Association of Canada, (Applicant) v. Salvation Army Eventide Home, (Respondent).

Unit #1: (*See Applications for Certification Dismissed Subsequent to a Post Hearing Vote*).

Unit #2: "all employees of the respondent at Niagara Falls regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the director of nursing, the assistant administrator, the administrator, office staff and the receptionists." (9 employees in unit).

0700-83-R: Graphic Arts International Union, Local 211 Toronto, Ontario, (Applicant) v. Intercheques (A Division of Cairn Capital Inc.), (Respondent).

Unit: "all employees of the respondent in Oshawa, save and except lead hands, persons above the rank of lead hand, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (116 employees in unit). (*Having regard to the agreement of the parties*).

0818-83-R: Ontario Public Service Employees Union, (Applicant) v. Deep River and District Hospital, (Respondent).

Unit #1: "all employees of the respondent at Deep River, Ontario, save and except professional medical staff, registered and graduate nurses, paramedical employees, accountant, supervisors, persons above the rank of supervisor, administrative secretary, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (13 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: (*See Applications for Certification Dismissed Subsequent to a Post Hearing Vote*).

0887-83-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. D. and C. Wardrope Cartage Limited, (Respondent).

Unit: "all employees of the respondent working in Woodbridge, Ontario, save and except dispatcher, persons above the rank of dispatcher, office and sales staff." (21 employees in unit). (*Having regard to the agreement of the parties*).

0916-83-R: United Food and Commercial Workers, International Union, AFL-CIO-CLC, (Complainant) v. Carrying Industries Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Trenton, Ontario, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (27 employees in unit). (*Having regard to the agreement of the parties*).

0920-83-R: Service Employees' Union, Local 210, Affiliated with Service Employees' International Union, A.F.L.-C.I.O.-C.L.C., (Applicant) v. St. Andrew's Residence, (Respondent) v. Employee, (Objector).

Unit #1: "all employees of the respondent at Chatham, Ontario, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office staff, paramedical employees, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (12 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: (*See Bargaining Agents Certified Subsequent to a Post Hearing Vote*).

0963-83-R: Canadian Guards Association, (Applicant) v. Pinkerton's of Canada Limited, (Respondent).

Unit: "all security guards employed by the respondent in the Municipality of Sudbury, including Agnew Lake Mines at Agnew Lake and E. B. Eddy Forest Products Limited at Nairn Centre, save and

except lieutenants and persons above the rank of lieutenant.” (39 employees in unit). (*Having regard to the agreement of the parties*).

0966-83-R: International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. The Municipality of Metropolitan Toronto and the Metropolitan Toronto Housing Company Limited, (Respondent) v. Metropolitan Toronto Civic Employees’ Union, Local 43, Canadian Union of Public Employees, (Intervener).

Unit #1: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices employed by the Municipality of Metropolitan Toronto and the Metropolitan Toronto Housing Company Limited on construction projects in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by a subsisting collective agreement between the respondent and the intervener.” (8 employees in unit).

Unit #2: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices employed by the Municipality of Metropolitan Toronto and the Metropolitan Toronto Housing Company Limited on construction projects in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by the subsisting collective agreement between the respondent and the intervener.” (8 employees in unit).

0967-83-R: International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. Corporation of the City of Toronto, (Respondent) v. Metropolitan Toronto Civic Employees’ Union, Local 43, Canadian Union of Public Employees, (Intervener).

Unit #1: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

0975-83-R: International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. The Municipality of Metropolitan Toronto and the Metropolitan Toronto Housing Company Limited, (Respondent) v. Metropolitan Toronto Civic Employees’ Union, Local 43, Canadian Union of Public Employees, (Intervener).

Unit #1: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices employed by the Municipality of Metropolitan Toronto and the Metropolitan Toronto Housing Company Limited on construction projects in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by a subsisting collective agreement between the respondent and the intervener.” (8 employees in unit).

Unit #2: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices employed by the Municipality of Metropolitan Toronto and the Metropolitan Toronto Housing Company

Limited on construction projects in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by a subsisting collective agreement between the respondent and the intervener.” (8 employees in unit).

1004-83-R: Teamsters Chemical, Energy and Allied Workers Local 424, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant) v. Witco Chemical Canada Limited, (Respondent).

Unit: “all employees of the respondent in Oakville, Ontario, save and except foremen, those above the rank of foreman, office clerical and technical staff, sales staff, and those persons covered by a subsisting collective agreement.” (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1055-83-R: The International Union of Operating Engineers, Local 796, (Applicant) v. Almonte General Hospital, (Respondent).

Unit: “all stationary engineers and helpers of the respondent in the Town of Almonte, Ontario, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements.” (4 employees in unit). (*Having regard to the agreement of the parties*).

1068-83-R: United Brotherhood of Carpenters and Joiners of America Local 19833, (Applicant) v. Honco Batiments D’Acier, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

1079-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Thorconcrete Limited, (Respondent).

Unit #1: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

1080-83-R: Lumber & Sawmill Workers’ Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Bois A. Lachance Lumber Limited, (Respondent).

Unit: "all employees of the respondent at its Sawmill and Planing Mill in Harty, Ontario, and its Wood Operation in the District of Cochrane, save and except foremen, those above the rank of foreman, sales and office staff." (14 employees in unit).

1086-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Curits Property Management Ltd., (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 221 and 265 Balliol Street, Toronto, Ontario, including resident superintendents, save and except property managers, persons above the rank of property manager and office and clerical staff." (6 employees in unit). (*Having regard to the agreement of the parties*).

1087-83-R: Alliance Employees' Union, (Applicant) v. Union of Postal and Communications Employees, (Respondent).

Unit: "all employees of the respondent in Ottawa, Ontario, save and except elected officers." (5 employees in unit). (*Having regard to the agreement of the parties*).

1089-83-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. A-1 Driver Training Inc., (Respondent).

Unit: "all employees of the respondent, save and except supervisors, those above the rank of supervisor, office and sales staff, and persons regularly employed for not more than 24 hours per week." (17 employees in unit). (*Having regard to the agreement of the parties*).

1111-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Reach Construction, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1113-83-R: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen – Local #12, (Applicant) v. City of Kitchener, (Respondent) v. Canadian Union of Public Employees, (Intervener).

Unit #1: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1117-83-R: International Union of Electrical, Radio and Machine Workers, (Applicant) v. Guideline Instruments Limited, (Respondent).

Unit: "all employees of the respondent in the City of Smith Falls, save and except foremen, those persons above the rank of foreman, office, clerical and technical staff, and sales staff." (23 employees in unit). (*Having regard to the agreement of the parties*).

1120-83-R: Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Applicant) v. K. P. Bronze Co. Ltd., (Respondent).

Unit: "all employees of the respondent in Aurora, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, draftsmen, watchmen, security guards, persons engaged in field erection work, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (20 employees in unit). (*Having regard to the agreement of the parties*).

1124-83-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Armbr Materials & Construction Ltd., (Respondent).

Unit: "all truck drivers in the employ of the respondent in the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1135-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Beaver Seaway Construction Division, Beaver Construction Group Limited, (Respondent).

Unit: "all employees of the respondent in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

1136-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Beaver Seaway Construction Division, Beaver Construction Group Limited, (Respondent).

Unit: "all employees of the respondent in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1147-83-R: Local Union 636 of the International Brotherhood of Electrical Workers, (Applicant) v. The Aurora Hydro Electric Commission, (Respondent).

Unit: "all office and clerical employees of the respondent at Aurora, Ontario, save and except manager, persons above the rank of manager, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (4 employees in unit). (*Having regard to the agreement of the parties*).

1152-83-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. SeaPark Industrial Dry Cleaners Ltd., (Respondent).

Unit: "all employees of the respondent in the City of St. Catharines, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, drivers, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (20 employees in unit). (*Having regard to the agreement of the parties*).

1157-83-R: Ironworkers District Council of Ontario, (Applicant) v. Central Forming and Concrete Inc., (Respondent).

Unit #1: "all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all reinforcing rodmen in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1168-83-R: Utility Workers of Canada, (Applicant) v. Pickering Hydro-Electric Commission, (Respondent).

Unit: "all employees of the respondent in the Town of Pickering, Ontario, save and except foremen, persons above the rank of foreman and office and clerical staff." (12 employees in unit). (*Having regard to the agreement of the parties*).

1169-83-R: Utility Workers of Canada, (Applicant) v. Pickering Hydro-Electric Commission, (Respondent).

Unit: "all office and clerical employees of the respondent in the Town of Pickering, Ontario, save and except supervisors, persons above the rank of supervisor, confidential secretary and senior accounting clerk." (9 employees in unit). (*Having regard to the agreement of the parties*).

1186-83-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Canadian Metal Claddings, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1208-83-R: International Union United Plant Guard Workers of America Local 1962, (Applicant) v. Sunnybrook Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all security officers of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor." (16 employees in unit). (*Having regard to the agreement of the parties*).

1214-83-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. Federated Building Maintenance Company Limited, (Respondent).

Unit #1: "all employees of the respondent at 969 Eastern Avenue, Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (26 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent at 969 Eastern Avenue, Toronto, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisor, office, clerical and sales staff." (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1216-83-R: Canadian Union of Public Employees, (Applicant) v. Northwestern Regional Library System, (Respondent).

Unit: "all employees of the respondent working at and out of Thunder Bay, Ontario, save and except the Director and persons above the rank of Director." (10 employees in unit). (*Having regard to the agreement of the parties*).

1236-83-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Arbro Materials & Construction Ltd., (Respondent).

Unit: "all truck drivers in the employ of the respondent in the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (17 employees in unit).

1253-83-R: Canadian Union of Public Employees, (Applicant) v. Fulford Home, (Respondent) v. Employee, (Objector).

Unit: "all employees of the respondent at Brockville, save and except the administrator, professional medical staff, registered and graduate nurses, and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

1273-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Pevicon Enterprises Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1290-83-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Cafe De La Paix, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except Hostess, persons above the rank of Hostess, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (12 employees in unit). (*Having regard to the agreement of the parties*).

1295-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, (Applicant) v. Terlyn Industries Limited, (Respondent).

Unit: "all employees of the respondent in the City of Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (17 employees in unit).

1298-83-R: Labourers' International Union of North America, Ontario Provincial District Council, Local 1059, (Applicant) v. A. G. Baird Limited, (Respondent) v. Sheet Metal Workers' International Association, and Ontario Sheet Metal Workers' Conference and its Local 30, (Intervener).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (18 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (18 employees in unit).

1326-83-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada – Local Union 628, (Applicant) v. Brown & Root Ltd., (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices, pipefitters and pipefitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices, pipefitters and pipefitters' apprentices in the employ of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-hearing Vote

0996-83-R: Energy and Chemical Workers Union, C.L.C., (Applicant) v. Misener Beverages Limited, (Respondent).

Unit: "all employees of the respondent in Belleville, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (30 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		28
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant		18
Number of ballots marked in favour of intervener		2

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0818-83-R: Ontario Public Service Employees Union, (Applicant) v. Deep River and District Hospital, (Respondent).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: "all employees of the respondent at Deep River, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except

professional medical staff, registered and graduate nurses, paramedical employees, accountant, supervisors, persons above the rank of supervisor, administrative secretary and persons covered by subsisting collective agreements.” (21 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters’ list		19
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant		12
Number of ballots marked against applicant		3

0920-83-R: Service Employees’ Union, Local 210, Affiliated with the Service Employees’ International Union, A.F.L.-C.I.O.-C.L.C., (Applicant) v. St. Andrew’s Residence, (Respondent) v. Employee, (Objector).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: “all employees of the respondent at Chatham, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office staff and paramedical employees.” (11 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		5

Applications for Certificaton Dismissed – No Vote Conducted

2453-82-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Viewmark Homes Ltd., (Respondent). (2 employees in unit).

0443-83-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Midvale Investments, (Respondent).

Unit: “all employees of the respondent employed at 225 and 227 Cosburn Avenue, Toronto, Ontario, save and except the property manager or anyone above the rank of property manager.” (1 employees in unit).

1257-83-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. The Regional Municipality of Halton, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees employed by the respondent in The Regional Municipality of Halton in Ontario in the Social Services Department save and except supervisors/managers and persons above the rank of supervisor/manager and employees covered under subsisting Collective Agreements.” (230 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1012-83-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Stacey Brothers Limited, (Respondent).

Unit: “all employees of the respondent at Mitchell, save and except foremen, those persons above the rank of foreman, office staff, laboratory technicians, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (97 employees in unit).

Number of names of persons on revised voters' list		70
Number of persons who cast ballots	65	
Number of ballots marked in favour of applicant		22
Number of ballots marked against applicant		43
Ballots segregated and not counted		3

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0756-82-R: United Food and Commercial Workers International Union, (Applicant) v. Primo Importing and Distributing Co. Ltd., (Respondent) v. Primo Employees' Association, (Intervener).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (200 employees in unit).

Number of names persons on revised voters' list		198
Number of persons who cast ballots	182	
Number of ballots marked in favour of applicant		110
Number of ballots marked against applicant		110
Ballots segregated and not counted		9

0582-83-R: Christian Labour Association of Canada, (Applicant) v. Salvation Army Eventide Home, (Respondent).

Unit #1: "all employees of the respondent at Niagara Falls, save and except the director of nursing, the assistant administrator, the administrator, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (35 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		28
Number of persons who cast ballots	27	
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		15
Ballots segregated and not counted		2

Unit #2: (*See Bargaining Agents Certified – No Vote Conducted*).

0989-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Richelieu Inn, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor, Ontario, regularly employed for not more than twenty-four hours per week, save and except supervisors, persons above the rank of supervisor, maitre d', executive chefs, sales and accounting staff and persons covered by the subsisting collective agreement." (19 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		15
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		4

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0467-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Mopal Construction Limited, (Respondent) v. Group of Employees, (Objectors).

0823-83-R: Labourers' International Union of North America, Local Union 597, (Applicant) v. H. J. McFarland Construction Co. Ltd. (Respondent).

1070-83-R: International Union of Operating Engineers, Local 796, (Applicant) v. Hopital Monfort, (Respondent).

1150-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Empire Hotel, (Respondent).

1190-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Dawn Enterprises, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0492-83-R: United Paperworkers International Union A.F.L., C.I.O., C.L.C., Kenora Local 1330, (Applicant) v. Boise Cascade Canada Ltd. and Argosy Trucking Ltd., (Respondents). (*Withdrawn*).

1044-83-R: Resilient Floorworkers, Local Union 2965, (Applicant) v. Centis Tile and Terrazzo Company Limited and 51036 Ontario Limited, (Respondent). (*Withdrawn*).

1071-83-R: United Steelworkers of America, (Applicant) v. Canadian Mine Enterprises Limited, Cameron McMyynn Contracting Limited, and Canadian Mine Services Limited, (Respondents) v. Labourers' International Union of North America, Ontario Provincial Council, Labourers' International Union of North America, Local 607, and United Brotherhood of Carpenters and Joiners of America, Local 1669, (Intervenors). (*Withdrawn*).

1292-83-R: The United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local Union 46, (Applicant) v. Domas Plumbing and Mississauga Construction Co. Limited, (Respondents). (*Granted*).

SALE OF A BUSINESS

0491-83-R: United Paperworkers International Union, A.F.L., C.I.O., C.L.C., Kenora, Local 1330, (Applicant) v. Boise Cascade Canada Ltd. and Argosy Trucking Ltd., (Respondents). (*Withdrawn*).

0927-83-R: Service Employees' Union, Local 183, (Applicant) v. Riverview Manor, operated by Daynes Health Care Ltd., (Respondent). (*Granted*).

1073-83-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. St. Clair Food Distributors Ltd., Store At Your Door Distributors (Windsor) Inc., (Respondents). (*Granted*).

1234-83-R: United Cement, Lime, Gypsum and Allied Workers International Union, Local 364, AFL-CIO-CLC, (Applicant) v. Custom Aggregates and Charlie Watson Trucking, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0425-83-R: Julie Vetere, (Applicant) v. United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., Local 114-5P, (Respondent) v. Chocolate Products Co. Ltd., (Intervener). (124 employees in unit). (*Dismissed*).

0487-83-R: Mike Burden, (Applicant) v. Teamsters Local Union No. 419, (Respondent).

Unit: "all employees of the employer working at Newmarket, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (31 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared	29
Number of names of persons who cast ballots	29
Number of ballots marked in favour of Teamsters Local Union No. 419	14
Number of ballots marked against Teamsters Local Union No. 419	15

0771-83-R: John Payotidis, (Applicant) v. Retail, Wholesale and Department Store Union A.F.L., C.I.O., C.L.C., Local 1688, (Respondent) v. Gus Bakolias, (Intervener). (29 employees in unit). (*Dismissed*).

0827-83-R: Lynne Cuff on behalf of Fairvern Staff, (Applicant) v. Service Employees International Union, Local 478, (Respondent) v. Vernon Nursing Home Services Limited, (Intervener).

Unit: "all employees of Vernon Nursing Home Services Ltd., Huntsville, Ontario, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor and office staff." (39 employees in unit). (*Granted*).

1047-83-R: Raymond Krzyzanowski, (Applicant) v. Canadian Union of Public Employees, (Respondent) v. Toronto Western Hospital, (Intervener). (6 employees in unit). (*Dismissed*).

1240-83-R: Shirley Tsicos, (Applicant) v. United Food and Commercial Workers International Union, Local 1000A, (Respondent).

Unit: "all employees of Panache Rotisseurs Inc. carrying on business as St. Hubert Bar-b-q at 50 Kennedy Road South, Brampton, Ontario, save and except manager, assistant manager, dining room manager, persons above those ranks, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (29 employees in unit). (*Terminated*).

1241-83-R: Phyllis Davies, (Applicant) v. United Food and Commercial Workers International Union, Local 1000A, (Respondent).

Unit: "all employees of Panache Rotisseurs Inc. operating under the name and style of "St. Hubert Bar-b-q" at its location at 1633 The Queensway in Metropolitan Toronto, Ontario, save and except the unit manager, unit assistant manager, dining room manager, assistant managers, and persons above those ranks, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (30 employees in unit). (*Terminated*).

1322-83-R: Marion Mulgrew & Natalina Simpson, (Applicant) v. United Steelworkers of America, Local 5264, (Respondent). (26 employees in unit). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1128-83-U: Canada Packers Inc., (Applicant) v. United Food & Commercial Workers International Union, Affiliated with The A.F.L. - C.I.O. and The Canadian Labour Congress (C.L.C.), Local 114P, V. L. Derraugh, N. Alexander, Perfecto Ng, et al., (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0987-83-U: G.M. Gest Inc., (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, William Weatherup, Edward Currie and Others Listed on Schedule “A”, (Respondent). (*Withdrawn*).

1304-83-U: Ellis-Don Limited, (Applicant) v. Local 249 of the United Brotherhood of Carpenters and Joiners of America and Angus Froats, (Respondent). (*Withdrawn*).

1385-83-U: Cliffside Pipelayers, a Division of Banister Continental Ltd., (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local Union 46, William Weatherup, Wayne Hollett, Antonio Sestito, et al., (Respondents). (*Granted*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1934-82-U: Canadian Union of Public Employees, C.L.C., Ontario Hydro Employees’ Union, Local 1000, (Complainant) v. Ontario Hydro, (Respondent). (*Granted*).

2428-82-U: Vito Gucciardi, (Complainant) v. United Food and Commercial Workers International Union, Local 175, (Respondent). (*Dismissed*).

2577-82-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Western Ontario Truck Centre Inc., (Respondent). (*Granted*).

0162-83-U: Ontario Public Service Employees Union, (Complainant) v. Mini-Skool Ltd., (Respondent). (*Dismissed*).

0219-83-U: Canadian Union of Public Employees, Local 79, (Complainant) v. The Corporation of the Municipality of Metropolitan Toronto, (Respondent). (*Dismissed*).

0297-83-U: Hotel Employees and Restaurant Employees Union Local 75, (Complainant) v. Ramada-Renaissance Hotel – Scarborough, (Respondent). (*Terminated*).

0330-83-U: Russell Chaney, (Complainant) v. United Steelworkers of America Local 89945, Frankel Steel Limited, (Respondents). (*Withdrawn*).

0335-83-U: Hotel Employees and Restaurant Employees Union Local 75, (Complainant) v. Ramada-Renaissance Hotel – Scarborough, (Respondent). (*Terminated*).

0384-83-U: Amalgamated Clothing and Textile Workers Union and its Local 1591, (Complainant) v. The Stewart Group Ltd./Engineered Yarns of Canada Ltd., (Respondent). (*Withdrawn*).

0423-83-U: The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, (Complainant) v. Glascar Corporation, c.o.b. as Great Lakes Fabricating, London, (Respondent). (*Withdrawn*).

1438-83-U: Maple City Residence Ltd., (Complainant) v. Christian Labour Association of Canada and Mary Elizabeth Drew, (Respondents). (*Dismissed*).

0457-83-U: Robert MacLeod and Group of Employees, (Complainant) v. The Canadian Union of Operating Engineers and General Workers and its Local 111 and Robert Whissell, (Respondent). (*Withdrawn*).

0463-83-U: Maple City Residence Ltd., (Complainant) v. Christian Labour Association of Canada and Maxine Culan, (Respondents). (*Granted*).

0519-83-U: Christian Labour Association of Canada, (Complainant) v. Maple City Residence Ltd., (Respondent). (*Granted*).

0638-83-U: Labourers' International Union of North America, Local 506, (Complainant) v. Global Demolition Ltd., (Respondent). (*Dismissed*).

0708-83-U: Labourers' International Union of North America, Local 183, (Complainant) v. Peel Condominium Corporation 112, (Respondent). (*Withdrawn*).

0717-83-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Complainant) v. Cosa Nova Fashions Ltd., Cosa Nova Fashions Ltd. carrying on business as Harold's Furs, (Respondents). (*Withdrawn*).

0722-83-U: Christian Labour Association of Canada, (Complainant) v. Maple City Residence Ltd., (Respondent). (*Granted*).

0746-83-U: United Steelworkers of America, (Complainant) v. Load-Lifter Manufacturing Ltd., (Respondent). (*Withdrawn*).

0747-83-U: Liberato Petti, Herbert Clark, et al, (Complainants) v. United Steelworkers of America, (Respondent) v. Lilo Rail of Canada Limited and Modern Plating Limited, (Intervenors). (*Dismissed*).

0774-83-U: Labourers' International Union of North America, Local 183, (Complainant) v. Peel Condominium Corporation #112, (Respondent). (*Withdrawn*).

0777-83-U: Christian Labour Association of Canada, (Complainant) v. Maple City Residence Ltd., (Respondent). (*Granted*).

0781-83-U: Service Employees' Union, Local 204, affiliated with the A.F.L., C.I.O., C.L.C., (Complainant) v. TrILERMASTER Freight Carriers Ltd., c.o.b. as Atripco Delivery Service, (Respondent). (*Withdrawn*).

0790-83-U: Christian Labour Association of Canada, (Complainant) v. Maple City Residence Ltd., (Respondent). (*Granted*).

0869-83-U: Service Employees' International Union, Local 204 (A.F.L., C.I.O., C.L.C.), (Complainant) v. K-Mart Canada Limited (Bayview Village Centre), (Respondent). (*Withdrawn*).

0886-83-U: Elizabeth Marie Horton, (Complainant) v. United Automobile Workers International Union Local 251 and North American Plastics Co. Ltd., (Respondents). (*Withdrawn*).

0898-83-U: United Steelworkers of America, (Complainant) v. Northern Plastics Ltd., (Respondents). (*Withdrawn*).

0941-83-U: Food and Service Workers of Canada, (Complainant) v. Chrysalis Restaurant Enterprises Inc. (Toronto), (Respondent). (*Withdrawn*).

0942-83-U: The IBEW Construction Council of Ontario and The International Brotherhood of Electrical Workers, Local Union 894, (Complainant) v. C. E. Cummus Canada Ltd., (Respondent). (*Granted*).

0946-83-U: Retail, Wholesale and Department Store Union, A.F.L., C.I.O., C.L.C., (Complainant) v. Rudolph's Specialty Bakeries Ltd., (Respondent). (*Withdrawn*).

0949-83-U: Timothy Oshunrinde, (Complainant) v. International Brotherhood of Electrical Workers Local Union 1966, (Respondent). (*Withdrawn*).

0959-83-U: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Artek Door Industries Ltd., (Respondent). (*Withdrawn*).

0960-83-U: Cameron Douglas Wonch, (Complainant) v. Rapid Ready Mix Limited, (Respondent). (*Withdrawn*).

0971-83-U: Mandeep Dhillon, (Complainant) v. Western Ontario Joint Board Amalgamated Clothing Workers of Ontario Local 303B, (Respondent Trade Union) v. John Forsyth Company Ltd., (Respondent Employer). (*Dismissed*).

0992-83-U: Altus Robert Lewis, (Complainant) v. Teamsters Local 419, (Respondent). (*Withdrawn*).

1002-83-U: Service Employees' Union, Local 210, (Complainant) v. St. Andrew's Residence, Chatham, (Respondent). (*Withdrawn*).

1009-83-U: Edwin H. E. Vander Meulen, (Complainant) v. International Federation of Professional and Technical Engineers AFL-CIO & CLC Local 164, (Respondent). (*Withdrawn*).

1015-83-U: United Steelworkers of America, (Complainant) v. Campbell Red Lake Mines Limited, (Respondent). (*Withdrawn*).

1016-83-U: Teamsters Local Union 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. D. C. Wardrope Cartage Ltd., (Respondent). (*Withdrawn*).

1021-83-U: Ignace Machudera, (Complainant) v. Teamsters Local Union No. 879, (Respondent) v. King Paving & Materials Ltd. (Intervener). (*Withdrawn*).

1024-83-U; 1025-83-U; 1026-83-U; 1027-83-U; 1028-83-U; 1029-83-U; 1030-83-U; 1031-83-U; 1032-83-U; 1033-83-U; 1034-83-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Seven-Up/Pure Spring Ottawa, (Respondent) v. Seven-Up/Pure Spring Employees' Association, (Intervener). (*Granted*).

1050-83-U: Richard Bell, (Complainant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 71, (Respondent). (*Granted*).

1051-83-U: United Steelworkers of America, (Complainant) v. Fireco Inc., (Respondent). (*Withdrawn*).

1052-83-U: United Steelworkers of America, (Complainant) v. Lilo Rail of Canada Limited and Modern Plating Limited, (Respondent). (*Withdrawn*).

1060-83-U: Balbir Sandhu, (Complainant) v. Local Union 7135, United Steel Workers of America, (Respondent). (*Dismissed*).

1083-83-U: United Food and Commercial Workers, International Union, A.F.L., C.I.O., C.L.C., (Complainant) v. Carrying Industries Limited, Roy Beith and Thorbert Smith, (Respondents). (*Terminated*).

1107-83-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. Richelieu Inn, (Respondent) v. Group of Employees, (Objectors). (*Withdrawn*).

1108-83-U: Lucien Roy, (Complainant) v. Canadian Paperworkers Union, CLC, Local 7135, (Respondent). (*Withdrawn*).

1125-83-U: Labourers' International Union of North America, Local 597, (Complainant) v. H. J. McFarland Construction Co. Ltd., (Respondent). (*Withdrawn*).

1126-83-U: The Canadian Union of Public Employees and its Local 2341, (Complainant) v. The Chapeau Senior Services Incorporated et al (Cedar Grove Lodge), (Respondent). (*Withdrawn*).

1144-83-U; 1145-83-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, (Complainant) v. B. C. Polygrinders Limited, (Respondent). (*Withdrawn*).

1167-83-U: Mohammad Azam, (Complainant) v. Vic Cosie (International Representative), United Rubber, Cork and Plastic Workers of America, (Respondent), Hemisphere International Manufacturing Company, (Intervener). (*Terminated*).

1180-83-U: Gloria De Fields, (Complainant) v. Charterways Employees Association, (Respondent). (*Withdrawn*).

1188-83-U; 1189-83-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Seven-Up/Pure Spring Ottawa, (Respondent) v. Seven-Up/Pure Spring Employees' Association, (Intervener). (*Granted*).

1235-83-U: United Cement, Lime, Gypsum and Allied Workers International Union, Local 364, A.F.L., C.I.O., C.L.C., (Complainant) v. Custom Aggregates, (Respondent). (*Withdrawn*).

1206-83-U: David G. Leitch, (Complainant) v. The United Steelworkers of America, (Respondent). (*Withdrawn*).

1249-83-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Seven-Up/Pure Spring Ottawa, (Respondent) v. Seven-Up/Pure Spring Employees' Association, (Intervener). (*Granted*).

1251-83-U: Tom James Tams, (Complainant) v. United Steelworkers of America, Local 8697, (Respondent). (*Withdrawn*).

1274-83-U: The United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, (Complainant) v. K-D Manufacturing Company Limited, (Respondent). (*Withdrawn*).

1275-83-U: Canadian Union of United Brewery, Flour Cereal, Soft Drink and Distillery Workers, (Complainant) v. Seven-Up/Pure Spring Ottawa, (Respondent) v. Seven-Up/Pure Spring Employees' Association, (Intervener). (*Granted*).

1286-83-U: Lawrence Pavlov & Charles Fasciano, (Complainant) v. Teamsters Local 938, (Respondent). (*Withdrawn*).

1333-83-U; 1334-83-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, (Complainant) v. B. C. Polygrinders Limited, (Respondent). (*Withdrawn*).

1378-83-U: Gerrard Kilby, (Complainant) v. Gerry Michaud, President of Local 199 U.A.W., (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1360-83-U: Alliance Employees' Union, (Applicant) v. Taxation Component, (Respondent). (*Withdrawn*).

JURISDICTIONAL DISPUTE

0298-83-JD: The International Brotherhood of Electrical Workers, Local Union 773, (Complainant) v. Jervis B. Webb Company of Canada, Ltd., (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local Union 1244, (Intervener) v. The International Association of Bridge, Structural and Ornamental Ironworkers and its Local Union 700, (Intervener) v. The International Association of Bridge, Structural and Ornamental Ironworkers and its Local Union 700, (Intervener) v. Spider Installations Ltd., (Intervener). (*Dismissed*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2259-82-M: The Children's Aid Society of the Regional Municipality of Halton, (Applicant) v. The Canadian Union of Public Employees, Local 2501, (Respondent). (*Dismissed*).

0331-83-M: Canadian Union of Public Employees, Local 369, (Applicant) v. The Corporation of the Town of Kapuskasing – Kapuskasing Public Utilities Commission, (Respondent). (*Granted*).

0741-83-M: Teamsters, Chauffeurs, Warehousemen, and Helpers Local Union No. 91, (Applicant) v. Intercity News Co. Ltd., (Respondent). (*Withdrawn*).

0884-83-M: Canadian Union of Public Employees, Local 1712, (Applicant) v. Brantwood Manor Nursing Homes Limited, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2734-82-OH: International Association of Machinists and Aero Space Workers (I.A.M.) Local Lodge 905, (Applicant) v. Dowty Equipment of Canada Ltd., (Respondent). (*Dismissed*).

COLLEGES COLLECTIVE BARGAINING ACT (Religious Exemption)

0681-83-M: Jacob Immanuel Schochet, (Applicant) v. OPSEU, (Respondent Trade Union.) v. Humber College, (Respondent Employer). (*Dismissed*).

CONSTRUCTION INDUSTRY GRIEVANCES

1989-81-M: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Bellai Brothers Ltd., (Respondent). (*Terminated*).

2026-81-M: International Union of Elevator Constructors, Local 50, (Applicant) v. Beckett Elevator Company Limited, (Respondent) v. National Elevator and Escalator Association, (Intervener). (*Granted*).

0820-82-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. George Ryder Construction (Cavilier Construction), (Respondent) v. Employer Bargaining Agency, (Intervener). (*Granted*).

1005-82-M: The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 1190, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*).

1486-82-M: International Union of Operating Engineers, Local 793, (Applicant) v. Dufferin Construction Company, (Respondent). (*Granted*).

2222-82-M: International Union of Operating Engineers, Local 793, (Applicant) V. Employer Bargaining Agency and its Affiliate Arlington Crane Service Ltd., (Respondent). (*Granted*).

2509-82-M: International Union of Operating Engineers, Local 793, (Applicant) v. Arlington Crane Service Ltd., (Respondent). (*Granted*).

0300-83-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Tri-Canada Inc., (Respondent). (*Dismissed*).

0318-83-M: United Brotherhood of Carpenters & Joiners of America, Local 18, (Applicant) v. Osgood Floor Coverings Limited, (Respondent). (*Granted*).

0352-83-M: National Elevator & Escalator Association and Montgomery Elevator Company Limited, (Applicant) v. International Union of Elevator Constructors Local 96, (Respondent). (*Withdrawn*).

0381-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Serit Construction Ltd., (Respondent). (*Withdrawn*).

0410-83-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada on its own behalf and on behalf of Local Union 527, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondent). (*Granted*).

0446-83-M: Carpenters' District Council of Toronto and vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ontario Hydro-Pickering, (Respondent). (*Withdrawn*).

0610-83-M: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Trojan Interior Contracting Ltd., (Respondent). (*Withdrawn*).

0685-83-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Looby Construction Limited, (Respondent). (*Withdrawn*).

0936-83-M: The Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 1190, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*).

0998-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. R.C.R. Construction, a division of 474222 Ontario Ltd., (Respondent). (*Granted*).

1000-83-M: I.U.O.E., Local 793, (Applicant) v. Nadrofsky Corporation, (Respondent). (*Withdrawn*).

1005-83-M: The Form Work Council of Ontario and Labourers' International Union of North America and Local 1081, (Applicant) v. Saldro Construction Limited, (Respondent). (*Withdrawn*).

1043-83-M: Resilient Floorworkers, Local Union 2965, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. 510356 Ontario Ltd., (Respondent). (*Withdrawn*).

1082-83-M: Labourers' International Union of North America, Local 607, (Applicant) v. 353080 Ontario Limited o/a Rok Engineering Construction, (Respondent). (*Granted*).

1091-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. C.F. Gatto Carpentry, (Operating as Ashton Carp.), (Respondent). (*Withdrawn*).

1094-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Silver Carpentry Ltd., (Respondent). (*Withdrawn*).

1095-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Desmark Developments Inc., (Respondent). (*Withdrawn*).

1096-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Edera Developments Ltd. (Respondent). (*Withdrawn*).

1105-83-M: The International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of Bricklayers and Allied Craftsmen, (Applicant) v. Able Masonry (Eastern) Limited, (Respondent). (*Granted*).

1101-83-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada on its own behalf and on behalf of Local Union 527, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondent). (*Withdrawn*).

1114-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. CO x CO Construction, A Subsidiary of T. Collini Company Limited, (Respondent). (*Withdrawn*).

1130-83-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, on its own behalf and on behalf of Local Union 853, (Applicant) v. S & E Mechanical a Division of 471177 Ontario Limited, (Respondent). (*Granted*).

1158-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. C. D. Carpentry, (Respondent). (*Withdrawn*).

1159-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Creador Carpentry, (Respondent). (*Withdrawn*).

1160-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Classic Carpenters, (Respondent). (*Withdrawn*).

1161-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Brazil Carpentry, (Respondent). (*Withdrawn*).

1162-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. A. M. Carpenters, (Respondent). (*Withdrawn*).

1163-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. A. & G. Carpenters, (Respondent). (*Withdrawn*).

1170-83-M: Labourers International Union of North America, Local 493, (Applicant) v. Antagon Construction Ontario Ltd., (Respondent). (*Granted*).

1171-83-M: United Brotherhood of Carpenters & Joiners of America Local 494, (Applicant) v. Anthes Equipment Ltd., (Respondent). (*Granted*).

1172-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. G. & L. Carpenters, (Respondent). (*Withdrawn*).

1173-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. G. I. F. Carpentry Contr., (Respondent). (*Withdrawn*).

1174-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Ferrel Carpentry, (Respondent). (*Withdrawn*).

1175-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Excalibur Carpentry, (Respondent). (*Withdrawn*).

1176-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Delco Carpentry, (Respondent). (*Withdrawn*).

1177-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. C. T. Framing, (Respondent). (*Withdrawn*).

1191-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. King Side Carpentry, (Respondent). (*Withdrawn*).

1192-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. J. F. Construction, (Respondent). (*Withdrawn*).

1193-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. L. T. Carpentry, (Respondent). (*Withdrawn*).

1194-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Lothar Hoelzel, (Respondent). (*Withdrawn*).

1195-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. G. Raimondo Carpentry, (Respondent). (*Withdrawn*).

1196-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. G. N. Construction Co., (Respondent). (*Withdrawn*).

1197-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. G. T. Carpentry, (Respondent). (*Withdrawn*).

1198-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. H. & H. Construction, (Respondent). (*Withdrawn*).

1199-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. H. C. R. Carpentry, (Respondent). (*Withdrawn*).

1200-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Independent Carpenters, (Respondent). (*Withdrawn*).

1201-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Inovative Energy Cosntruction, (Respondent). (*Withdrawn*).

1203-83-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. C.I.A. Drywall & Acoustic Services Inc., (Respondent). (*Granted*).

1220-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Raf-Tar Construction, (Respondent). (*Withdrawn*).

1221-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. V.F. Carpenters, (Respondent). (*Withdrawn*).

1222-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Roca Carpenters, (Respondent). (*Withdrawn*).

1223-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Tonon Construction Ltd., (Respondent). (*Withdrawn*).

1224-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Pombal Carpenters, (Respondent). (*Withdrawn*).

1225-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. P. T. M. Carpenters, (Respondent). (*Withdrawn*).

1227-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Santos Bro. Carpenters, (Respondent). (*Withdrawn*).

1228-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. S. Bros Carpentry, (Respondent). (*Withdrawn*).

1229-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Smeriglio Carpentry, (Respondent). (*Withdrawn*).

1230-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Thosti Carpenters, (Respondent). (*Withdrawn*).

1231-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Viduka Carpentry, (Respondent). (*Withdrawn*).

1232-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Stockdale Carpentry Ltd., (Respondent). (*Withdrawn*).

1237-83-M: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, (Applicant) v. P & R Concrete Finishing Co., a Division of 361870 Ontario Limited, (Respondent). (*Granted*).

1243-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Monte Grappa Carpenter, (Respondent). (*Withdrawn*).

1244-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Minho Carpentry, (Respondent). (*Withdrawn*).

1245-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Marina Carpenters Ltd., (Respondent). (*Withdrawn*).

1246-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Nortenha Carpentry Contractors Ltd., (Respondent). (*Withdrawn*).

1247-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Paglia Bros. Carpenters, (Respondent). (*Withdrawn*).

1248-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Pleasant Valley Construction, (Respondent). (*Withdrawn*).

1252-83-M: Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Applicant) v. Koldflow Refrigeration Limited, (Respondent). (*Withdrawn*).

1280-83-M: The Formwork Council of Ontario, (Applicant) v. Friul Structures Ltd., (Respondent). (*Withdrawn*).

1281-83-M: The Formwork Council of Ontario, (Applicant) v. New Fly Forming Construction Ltd., (Respondent). (*Withdrawn*).

1284-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. M & U Masonry Company Limited, (Respondent). (*Withdrawn*).

1299-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Pit-On Construction Co. Ltd., (Respondent). (*Withdrawn*).

1310-83-M: Resilient Floorworkers, Local Union 2965, (Applicant) v. Saanich Enterprises Ltd., (Respondent). (*Withdrawn*).

1323-83-M: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1081, (Applicant) v. Belmont Concrete Finishing Company Ltd., (Respondent). (*Withdrawn*).

1330-83-M: Resilient Floorworkers, Local 2965, (Applicant) v. Calibre Enterprises Limited, (Respondent). (*Granted*).

1344-83-M: The Formwork Council of Ontario, (Applicant) v. Consolidated Concrete Structures Ltd., (Respondent). (*Withdrawn*).

1383-83-M: Saldro Construction Ltd., (Applicant) v. The Form Work Council of Ontario and Labourers' International Union of North America and Local 1081, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0651-83-R: Retail, Wholesale and Department Store Union, A.F.L., C.I.O., C.L.C., (Applicant) v. Rudolph's Specialty Bakeries Ltd., (Respondent). (*Denied*).

0825-83-R: Labourers' International Union of North America, Ontario Provincial District Council, Local 1059, (Applicant) v. Astro Concrete & Servicing London, (Respondent). (*Denied*).

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